IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1694

ARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

v.

LVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

APPENDIX

INDEX FOR APPENDIX

Docket Entries 1

Complaint 6

Exhibit A* 15

Exhibit B* 17

Exhibit C 21

Exhibit D 25

Exhibit E* 27

Exhibit F 34

Plaintiffs' Interrogatories 37

Defendants' Answer to Complaint 39

Defendants' Answers to Interrogatories 42

Stipulation of Facts 48

Amended Stipulation of Facts 51

Opinion On Motion to Dissolve Three-Judge Court 60

Order on Motion to Dissolve Three-Judge Court 68

Opinion and Judgment on Merits 1a

Notice of Appeal 22a

Statutes and Regulations Involved 23a

* Exhibits A, B, and E to the original complaint were Xerox copies of 37 U.S.C.A. § 401 and § 403 (A & B) and 10 U.S.C.A. §§ 1072-1076 (E). The original exhibits therefore contained all the annotations of U.S.C.A. for their respective sections. For the sake of clarity these lengthy notes were deleted when compiling the appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,	)	
Plaintiffs,	)	
vs.	)	
MELVIN C. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMONS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,	)	CIVIL ACTION NO. 3232-N
Defendants.	)	

RECORD ON PLAINTIFFS' APPEAL
TO THE SUPREME COURT OF THE UNITED STATES
FROM JUDGMENT OF THREE-JUDGE COURT
(Hon. Richard T. Rives, U. S. Circuit Judge,
Hon. Frank M. Johnson, Jr., U. S. District Judge,
and Hon. Frank H. McFadden, U. S. District Judge),
Entered on APRIL 5, 1972

A P P E A R A N C E S

For Plaintiffs:

Morris Dees, Jr.
Joseph J. Levin, Jr.
P. O. Box 2087
Montgomery, Alabama 36103

For Defendants:

Ira DeMent, United States Attorney
Kenneth E. Vines, Assistant U. S. Attorney
Middle District of Alabama
P. O. Box 197
Montgomery, Alabama 36101

Harlington Wood
Acting Assistant Attorney General
Civil Division
U. S. Department of Justice
Washington, D. C. 20530

INDEX TO RECORD

	Page Number
Certified copy of docket entries	iv
Complaint filed December 23, 1970	1
Order of Chief Judge of U. S. Court of Appeals for Fifth Circuit, filed January 7, 1971, convening three-judge court	24
Order setting hearing, filed January 7, 1971. Testimony, where practicable, to be presented by deposition as of this date; pre-	

trial briefs ordered filed with each member of Court 26

Notice to Attorney General of the United States, U. S. Attorney for this district, and each defendant of setting of hearing 27

Order, January 11, 1971, continuing in all respects the terms of the order entered on January 7, 1971 29

Order of Chief Judge of U. S. Court of Appeals for Fifth Circuit, filed January 22, 1971, reconstituting three-judge court 30

Order setting hearing, filed February 12, 1971 31

Defendants' motion for extension of time to file answer, February 26, 1971 32

Order, February 26, 1971, granting defendants an extension of time to answer complaint 34

Defendants' motion for further extension of time to file answer, March 25, 1971 35

Order, March 25, 1971, granting defendants further extension of time to answer complaint 36

Plaintiffs' interrogatories to defendant Melvin R. Laird, his successors and assign, March 30, 1971 37

Defendants' answer to complaint, April 12, 1971 39

Order, April 15, 1971, requiring defendants to file a pretrial brief in support of the fourth defense as set out in answer within ten days from this date; plaintiffs allowed an additional ten days to respond to said brief 41

Defendants' answers to interrogatories, April 26, 1971 42

Defendants' motion to dissolve three-judge court, April 26, 1971 46

Plaintiffs' motion to strike defendants' fourth defense, April 30, 1971 54

Defendants' opposition to motion to strike, May 14, 1971 55

Order, May 19, 1971, cancelling hearing. Parties ordered to file briefs 57

Stipulation of parties, May 20, 1971 58

Amendment to stipulation of parties, May 24, 1971 60

Per curiam opinion, June 14, 1971, on motion to dissolve three-judge court 65

Order, June 14, 1971, denying defendants' motion to dissolve the three-judge court 70

Order, July 22, 1971, granting parties an extension on the additional brief required 71

Opinion and judgment, April 5, 1972, of Hon. Richard T. Rives and Hon. Frank H. McFadden 72

Dissent, April 5, 1972, of Hon. Frank M. Johnson, Jr., from the majority's opinion and judgment 85

Plaintiffs' notice of appeal to Supreme Court, April 26, 1972 89

Clerk's certification 91

* * * * *

CLERK'S CERTIFICATE

I, Jane P. Gordon, Clerk of the United States District Court for the Middle District of Alabama, do hereby certify that the foregoing pages numbered One through Ninety, as shown by the index attached, constitute a full, complete and true copy of the record now remaining in my office among the records of this Court in the above-styled case.

IN WITNESS WHEREOF, I have hereunto subscribed my

name and affixed the seal of this Court at Montgomery, Alabama, this 21st day of June, 1972.

JANE P. GORDON, Clerk
United States District Court
Middle District of Alabama

By: s/ Marie Thurman
Deputy Clerk

* * * * *

COMPLAINT

Filed December 23, 1970

I. JURISDICTION

1. This is a civil action seeking a declaration of the constitutionality of and a permanent injunction against enforcement of 37 USCA Sections 401 and 403, Department of Defense, Military Pay and Allowances Entitlements Manual, Section 30242 (January, 1967), 10 USCA Sections 1072 and 1076, and Air Force Regulation 30-20, Chart of Entitlement to Benefits and Privileges, Attachment 2. Jurisdiction is invoked under the due process clause of the Fifth

Amendment to the United States Constitution, and the equal protection guarantees arising therefrom, and under 28 USCA Sections 1331, et seq. and 2284.

2. The PLAINTIFFS bring this action on their own behalf ond on behalf of all other members of the Armed Forces and their spouses and dependents similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The prerequisites of subsections (a), (b) (1), (b) (2), and (b) (3) of that rule are satisfied. There are common questions of law and fact affecting the several rights of female members of the Armed Forces and their immediate families not to be deprived of due process and equal protection of the law through unreasonable and arbitrary distinctions founded upon the sex of such member. The members of PLAINTIFFS' class are so numerous as to make it impractical to bring them all before this Court. The claims of the PLAINTIFFS are typical of the claims of the class, and the relief sought against the Defendants is typical of the relief sought by all members of the class. The

prosecution of separate actions by individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties. Furthermore, the parties opposing the PLAINTIFFS' class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

The questions of law and fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

II. PARTIES

A. Plaintiffs

1. SHARRON A. FRONTIERO is twenty-three years of age and is a First Lieutenant in the United States Air Force (USAF). She is a physical therapist assigned to the Maxwell Air Force Base (MAFB) Hospital, MAFB, Alabama. Her residential address is 559 South Court Street, Montgomery, Alabama.

2. JOSEPH FRONTIERO is twenty-four years of age and is the husband of SHARRON A. FRONTIERO. He is a first semester Junior at Huntington College, Montgomery, Alabama, and also resides at 559 South Court Street, Montgomery, Alabama.

B. Defendants

1. MELVIN C. LAIRD is SECRETARY OF DEFENSE for the United States of America, and as such has the ultimate responsibility for enforcement of all statutes, rules and regulations promulgated by the United States Congress as they apply to pay, allowances and medical benefits granted members of the Armed Forces of the United States.

2. DR. ROBERT C. SEAMONS, JR. is SECRETARY OF THE AIR FORCE and as such has the ultimate responsibility for the enforcement of all rules and regulations promulgated by the United States Air Force, and the intermediate responsibility for the enforcement of laws of the United States as they apply to pay, allowances and medical benefits granted members of the United States Air Force.

3. COLONEL CHARLES G. WEBER is the COMMANDING OFFICER of MAFB. As such, he has the same responsibili for MAFB as does the Secretary of the Air Force for the entire service.

III. CAUSE OF ACTION

1. SHARRON FRONTIERO joined the Air Force on October 1, 1968, under a four (4) year obligation. On December 27, 1969, she married JOSEPH FRONTIERO, who was and remains a full-time student at Huntington College. With the exception of $205.00 per month received by JOSEPH FRONTIERO under the educational

provisions of the G.I. Bill, LT. FRONTIERO provides the sole support for both of them.

2. Under 37 USCA Sections 401 (Exhibit A) and 403 (Exhibit B), a married male living off base in the USAF is entitled to Basic Allowance for Quarters (BAQ), which, due to his married status, includes an additional allowance depending upon his grade and the number of dependents he claims. This allowance continues regardless of the ability of his spouse to earn a living and without regard to her individual income from whatever source derived. However, under these same statutes, the husband of a female member is not recognized as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. These statutes as applied to women are supplemented by Department of Defense, Military Pay and Allowances Entitlements Manual, Section 30242 (January, 1967) (Exhibit C). MAFB provides no housing for the families of married female members of the Air Force.

3. In October, 1970, LT. FRONTIERO informed LTC Mary Schmid, her commanding officer of the Physical Therapy Unit, MAFB Hospital, that she desired an additional allowance for her spouse, JOSEPH FRONTIERO. LTC Schmid advised LT. FRONTIERO to consult the Base Legal Office.

4. Several days after her conversation with LTC Schmid, LT. FRONTIERO consulted a Sergeant at the Base Legal Office and was told by him that she was entitled neither to a BAQ which would include an allowance for her spouse, nor to a single BAQ to assist her in living off base.

5. LT. FRONTIERO then advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional allowance for her spouse. Col. Jernigan said the regulations prohibited such allowance.

6. In November, 1970, LT. FRONTIERO visited Col. Royal Connell, a member of the Inspector General's staff, MAFB. He instructed her to compile a formal complaint. This she did and the Complaint was sub-

mitted. (Exhibit D). Approximately one week afterwards, LT. FRONTIERO was informed by Col. Connell that her complaint had been checked out and there was no way for her to get any housing allowance.

7. Under 10 USCA Sections 1072 and 1076, the wife and children of military personnel are entitled to certain medical benefits (Exhibit E). However the husband of a female member of the Armed Forces is entitled to no medical benefits unless the husband is "in fact dependent upon" the female member for more than one-half his support. Once again, the wife of a military man is entitled to these benefits regardless of her potential or actual income. LT. FRONTIERO desires that these benefits extend to her spouse, JOSEPH FRONTIERO. These statutes as applied to women are supplemented by AFR 20-30, Chart of Entitlement to Benefits and Privileges, Attachment 2. (Exhibit F).

8. PLAINTIFFS contend that the distinctions drawn by the aforesaid statutes and regulations insofar as they require different treatment for male

and female members of the Armed Forces, and for PLAINTIFF SHARRON FRONTIERO in particular, are arbitrary and unreasonable, in that they deny equal protection of the laws to PLAINTIFFS. Each is thereby unconstitutional as being in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, THE PREMISES CONSIDERED, PLAINTIFFS respectfully pray that this Court take jurisdiction of this cause, and that a special three-judge Court be called to hear and determine this cause as provided by law in 28 USCA Section 2284, and that upon a final determination of the merits of this case this Court will enter an order:

1. Declaring that 37 USCA Sections 401 and 403 are unconstitutional and enjoining their enforcement.

2. Declaring that Department of Defense, Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) is unconstitutional and enjoining enforcement.

3. Declaring that 10 USCA Sections 1072 and 1076

are unconstitutional and enjoining their enforcement.

4. Declaring that Air Force Regulation 30-20, Chart of Entitlement to Benefits and Privileges, Attachment 2 unconstitutional and enjoining enforcement.

5. Awarding back pay and allowances to LT. FRONTIERO from December 27, 1969.

Respectfully submitted,

LEVIN & DEES

BY
Joseph J. Levin, Jr.

ATTORNEYS FOR PLAINTIFFS

EXHIBIT A

37 § 401 PAY AND ALLOWANCES Ch. 7

§ 401. Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact

dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469

EXHIBIT B

§ 403. Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	Without dependents	With dependents
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00

E-4 (over four years service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than four years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect

not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if, becuase of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed

forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions

of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, § 10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718 §§ 49(a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, § 1(3), Dec. 16, 1967, 81 Stat. 651.

EXHIBIT C

b. Stepchild. A stepchild is an eligible dependent for BAQ entitlement if the child is in fact dependent on the member. A member is not entitled to BAQ for a stepchild if the child is receiving support from his natural father, who receives BAQ for the child. A stepparent-stepchild relationship ends upon divorce from the blood parent, but not upon death of the blood parent. Hence, entitlement to BAQ for a stepchild may be established after death of the blood parent.

c. In Fact Dependency. An adopted child or a stepchild is considered in fact dependent if the member contributes a substantial portion of the child's support, and if the child's welfare would be affected

without this contribution. Residence in the member's household does not of itself establish dependency, nor is a child in fact dependent if the member's contributions merely improve the child's living conditions.

30240. Dependent Child Adopted by a Third Party

A member is not entitled to BAQ for a child after the child is adopted by a third party and final order or decree of adoption has been entered. Entitlement to BAQ continues after an interlocutory decree has been entered if the decree does not change the legal relationship between the child and adopting parent, and the member supports the child.

30241. Wife or Child Confined in Penal or Correctional Institution

a. BAQ Payable. Confinement of a member's lawful wife or unmarried minor child in a penal or correctional institution does not affect his right to BAQ on the dependent's behalf, unless:

(1) The member refuses to support the dependent

or

(2) The member has been absolved from supporting the dependent; or

(3) The period of confinement may extend beyond five years; or

(4) The case is otherwise doubtful.

b. Doubtful Cases. Submit cases involving sentence extending beyond five years, and any other doubtful cases as follows

(1) Officer's Defendent. Request advance decision of the Comp Gen of the U.S. Do not credit BAQ pending decision.

(2) Enlisted Member's Dependent. Send case to FCUSA; Navy Family Allowance Activity; Commandant, Marine Corps; or AFAFC, as applicable, for determination. Do not credit BAQ pending determination if sentence provides for confinement beyond five years.

c. Class Q Allotment. See chapter 2, part six, for rules governing class Q allotment for a dependent confined in penal or correctional institution.

30242. Dependents of Female Member

a. Husband. The law does not recognize the husband of a female member as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. His monthly income must be less, and her monthly contribution more than one-half of his average monthly expense The usual household expenses (such as rent, or if they own their own home, real estate taxes, mortgage payments, cost of operating the family car, etc.) constitute joint expenses and are divided equally between them. Only unusual personal expenses, such as medical actually and necessarily incurred by the husband, are considered as individual expenses. A female member who voluntarily assumes support of her husband to permit him to attend college, although he is physicall and mentally capable of self-support, is not considere to have a husband who is in fact dependent on her for over one-half of his support.

b. Child. A female member is entitled to BAQ for a minor child only when the child is in fact dependent upon her for over one-half of his support.

c. Other Dependents. Conditions of dependency of a child over 21 years of age or a parent are the same as for a male member.

d. Determinations of Dependency. Determinations concerning dependents of female members are made by the authorities designated in Table 3-2-1 or 3-2-2.

EXHIBIT D

COPY OF COMPLAINT TO INSPECTOR GENERAL

RECORD OF PERSONAL CONFERENCE

Date of Interview
16 Oct. 70

Complainant's Installation	Location
Maxwell USAF Hosp.	Maxwell

Installation At Which Complaint Taken	Location
I.G. Office	Maxwell

Interviewee	Age	USA	Marital Status
Frontiero, Sharron A.	23	Illegible	Married

Organization	Telephone No.	Job Title
USAF Hosp.	7987	Physical therapist

Grade	Length of Service	No. Of Dependents
1st Lt	4 years	—

Nature of Interview	Type of Conference
X Complaint	X Special Appointment with Inspector

Matter previously presented	Matter to be kept Confidential
X To Unit Commander	X No
X To Immediate Supervisor	

Statement of Interviewee

I am married to civilian man who is a full time pre med student at Huntingdon College. He receives G. I. benefits which just barely cover the cost of his education. All other expenses (food, rent, insurance, car, etc.) are covered by my salary alone. My husband does not hold a job.

Because I am married, I am not entitled to a housing allowance (according to the AF pay manual) unless my husband can be proven to be mentally or physically incapacitated (which he is not). I was given a BOQ room in which my husband and I cannot possible live together. Therefore, I maintain an apratment off base at my own expense. Recently I gave up my BOQ room altogether because I had no use for it.

I feel that it is unrealistic to deny a housing allowance to a woman who is supporting her husband, when married men are allowed a housing allowance whether or not they are completely supporting their wives.

I suggest that the Air Force revise their regulations to either:

1. Award house allowance on the basis of need (taking into account the combined expenses and salaries of both husband and wife.)

OR:

2. Award married women a housing allowance on the same basis it is now awarded to men.

Signature of Interviewee
s/ Sharron A. Frontiero

Informed Lt. Frontiero on 24 Nov 70 that no further action could be taken on her complaint. Nothing has changed since the last time I talked to her.

Lt. Frontiero infomred me that she had contacted personnel from the Civil Liberties Union. They told her that they felt she had a valid complaint. They told the Lt. that after they caught up with some of their back cases they would get in touch with her.

s/ Anthony Carmelo
ANTHONY CARMELO
SMSgt, USAF
Personnel Inspector

Typed name of interviewer	Grade	Signature
Anthony Carmelo	SMSgt	s/ Anthony Carmelo

INTERVIEWEE NOTIFIED

Date	How Notified	By Whom
24 Nov 70	Orally	Anthony Carmelo

BASE COMMAND NOTIFIED

Date	How Notified	By Whom
25 Nov 70	Orally	(1st name illegible) Connell

EXHIBIT E

§ 1072. Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(c) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of

a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1073. Administration of sections 1071-1085 of this title

Except as otherwise provided in sections 1071-1085 of this title, the Secretary of Defense shall administer those sections for the armed forces under his jurisdiction, and the Secretary of Health, Education, and Welfare shall administer them for the Coast Guard when the Coast Guard is not operating as a service in the Navy, and for the Coast and Geodetic Survey and the Public Health Service. Added Pub.L. 85-861, § 1 (25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1074. Medical and dental care for members and certain former members

(a) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a member of a uniformed service who is on active duty is entitled to medical and dental care in any facility of any uniformed servi

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a member or former member of

a uniformed service who is entitled to retired or retainer pay, or equivalent pay, except a member or former member who is entitled to retired pay under chapter 67 of this title and has served less than eight years on active duty (other than for training), may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. Added Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1075. Officers and certain enlisted members: subsistence charges

When an officer or former officer of a uniformed service is hospitalized under section 1074 of this title, he shall pay an amount equal to the part of the charge prescribed under section 1078 of this title that is attributable to subsistence. An enlisted member, or former enlisted member, of a uniformed service who is entitled to retire or retainer pay, or equivalent pay may not be so charged.

Added Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1447

§ 1076. Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member of former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training)

may, upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Add Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

CHART OF ENTITLEMENT TO BENEFITS AND PRIVILEGES

Establish eligibility as a dependent/eligible recipient according to the appropriate paragraph. Numbers in parenthesis refer to explanatory notes at end of chart.

Eligible Recipients	Medical Care: Civilian Facility	Medical Care: Service Facility	Commissary	Exchange	Theater
1. Dependents of active duty or paid retired members of the Uniformed Services					
a. Lawful wife	yes	yes	yes	yes	yes
b. Lawful husband	(1)	(1)	yes	(1)	yes
c. Unmarried legitimate children, including adopted and step-children.					
(1) Under 21 years	yes	yes	(3)	(1)	yes
(2) Over 21 years	(4)	(4)	(3)	(4)	(2)
d. Parents	no	(5)	(3)	(1)	(2)
e. Parents-in-law	no	(5)	(3)	no	(2)

EXHIBIT F

2. Surviving dependents of members of the Uniformed Services who died while on active duty or in a paid retired status					
a. Unremarried widow	yes	yes	yes	yes	yes
b. Unremarried widower	(6)	(6)	no	no	no
c. Unmarried legitimate children, including adopted and step-children.					
(1) Under 21 years	yes	yes	(3)	(7)	yes
(2) Over 21 years	(8)	(8)	(3)	(7)	(2)
d. Parents	no	(10)	(3)	no	no
e. Parents-in-law	no	(10)	(3)	no	no
3. Other members of the family of active duty or retired members or widows, such as wards, brothers, sisters, nephews, nieces, grandparents, "in loco parentis," any blood or affinitive type relative	no	no	(3)	no	(2)

4. Honorably discharged veterans of the U.S. Armed Forces, who are totally (100%) disabled as a result of a service connected disability and are so certified by the Veterans Administration	no	no	yes	limited	yes
a. And one member of his immediate household	no	no	(9)	(9)	no
5. Unremarried widow of a member of a Reserve Component of the Armed Forces who died in the line of duty complying with an order which specified an active duty status *for a period of more than 30 days*	yes	yes	yes	yes	yes
a. Unmarried legitimate children, including adopted and step-children					
(1) Under 21 years	yes	yes	(3)	(7)	yes
(2) Over 21 years	(8)	(8)	(3)	(7)	(2)

INTERROGATORIES

Filed March 30, 1971

TO: MELVIN R. LAIRD, His successors and assigns

Plaintiffs request that the aforenamed Defendant, or any party whom he or the Department of Defense shall designate as being capable and authorized to disclose such information, answer, in accordance with Rule 33, FRCP, the following interrogatories:

1. (a) How many females are members of the United States Air Force?

(b) Of these how many are married?

(c) Of those married how many provide more than half the total financial support for their families?

(d) Of those married how many provide the sole financial support for their families?

(e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ

allowances from the Air Force for her family?

2. (a) How many males are members of the United States Air Force?

(b) (c) (d) Answer as in question #1 as those questions relate to males in the Air Force.

3. (a) How many females are members of the United States armed services as a whole? ("Armed services" defined as those groups whose members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403).

(b) (c) (d) (e) Answer as in question #1.

4. (a) (b) (c) (d) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

PLEASE TAKE NOTICE that a copy of such answers is to be served upon the undersigned within fifteen (15) days after the service of the interrogatories.

Interrogatories served on Defendant by personally delivering the same to counsel for the United States,

Assistant U. S. Attorney, F. E. Leonard, Jr., on this the 30th day of March, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.

ATTORNEY FOR PLAINTIFFS

* * * * *

ANSWER

Filed April 12, 1971

Defendants, by their undersigned attorneys, for their answer admit, deny and aver as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the action.

SECOND DEFENSE

Insofar as plaintiffs seek to obtain Basic Allowances for Quarters, they have failed to exhaust their administrative remedies.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

This action should not be decided by a three-judge district court and all proceedings herein should be remanded to a single-judge district court.

FIFTH DEFENSE

In answer to the number paragraphs of the complaint, defendants admit, deny, and aver as follows:

I. 1. Deny as conclusions of law.

2. Deny

II. A 1 and 2. Admit.

II. B 1. Admit that Melvin R. Laird is Secretary of Defense and deny the remaining allegations as conclusions of law.

II. B 2. Admit that Robert C. Seamans, Jr. is Secretary of the Air Force and deny the remaining allegations as conclusions of law.

II. B 3. Admit that Charles G. Weber is the Commanding Officer of Maxwell Air Force Base,

Alabama and deny the remaining allegations as conclusions of law.

III. 1. Admit except deny that Lt. Frontiero provides the sole support for herself and Joseph Frontiero and aver that Joseph Frontiero receives approximately $205.00 per month under the educational provisions of the G. I. Bill and $30.00 from employment.

III. 2. Deny as conclusions of law.

III. 3 and 4. Deny for lack of knowledge or information sufficient to form a belief.

III. 5 and 6. Admit.

III. 7. Deny as conclusions of law.

III. 8. Deny.

Defendants deny each and every allegation of the complaint not specifically admitted or qualified above.

Defendants deny that plaintiff are entitled to the relief prayed for in the complaint and deny that plaintiffs are entitled to any relief whatsoever.

WHEREFORE, Defendants pray that the action be

dismissed with prejudice and that defendants be granted their costs.

IRA DE MENT
United States Attorney

BY: s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answer on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087, Montgomery, Alabama 36103.

Done this 12th day of April, 1971.

s/ F. E. Leonard, Jr.
Assistant United States Attorney

* * * * *

ANSWERS TO INTERROGATORIES

Filed April 26, 1971

Defendants, by their undersigned attorney, based

on information presently available to him in his files, answers the Interrogatories propounded by Plaintiffs' attorney to Defendant Secretary of Defense Melvin R. Laird, on information and belief, as follows:

INTERROGATORY NO. 1. (a) How many females are members of the United States Air Force?

ANSWER: 4,664 officers and 10,659 enlisted women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (b) Of these how many are married?

ANSWER: 736 officers and 1,262 enlisted married women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1 (c) Of those married how many provide the sole financial support for their families?

ANSWER: Defendants do not know.

INTERROGATORY NO. 1 (e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated

so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family?

ANSWER: Defendants do not know.

INTERROGATORY NO. 2 (a) How many males are members of the United States Air Force?

ANSWER: 123,676 officers and 616,163 enlisted men were members of the United Air Force on 31 December 1970.

INTERROGATORY NO. 2(b) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: 102,114 officers and 368,227 onlisted married men were members of the United States Air Force on 31 December 1970.

INTERROGATORIES NOS. 2(c) and (d) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 3(a) How many females are members of the United States armed services as a whole? ("Armed Services" defined as those groups whose

members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403).

ANSWER: 8,778 officers and 29,873 enlisted women were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 3(b) Answer as in question #1.

ANSWER: 935 officers and 3,218 enlisted married women were members of the Army, Navy, Air Force and Marine Corps on 31 December 1970.

INTERROGATORIES NOS. 3(c) and (d) Answer as in question #1.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 4(a) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 378,891 officers and 2,442,783 enlisted men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 4(b) Answer as in question #2 substituting "armed services as a whole" for "Air

Force."

ANSWER: 207,772 officers and 1,231,980 enlisted married men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORIES NO. 4(c) and (d) Answer as in question #2 sutstituting "armed services as a whole" for "Air Force".

ANSWER: Defendants do not know.

Dated this 23rd day of April, 1971

IRA DeMENT
United States Attorney

s/ F. E. Leonard, Jr.
F.E. LEONARD
Assistant United States Attorney

s/ C. Claude Teagarden
C. CLAUDE TEADGARDEN
Lt Colonel, USAF
Litigation Division, Office of The Judge Advocate General, USAF

City of Washington)
) ss
District of Columbia)

C. Claude Teagarden, being first duly sworn, deposes and says: I am the Chief, Personnel Litigation Branch, Litigation Division, Office of the Judge Advocate General of the United States Air Force, an attorney, and am responsible within the Departments of Defense and the Air Force for the management of the defense of the above entitled cause.

The statements contained in the foregoing Answers To Interrogatories Propounded by Plaintiffs (dated 30 March 1971 and received by defendants 6 April 1971) are true to the best of my knowledge and belief, based upon the information contained in the files available to me.

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF

s/ Caroline Wiewara
NOTARY PUBLIC

Caroline Wieware
Notary Public
My Commission Expires Jan 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answers to Interrogatories Propounded by Plaintiffs 30 March 1971 and Received by Defendants 6 April 1971, on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087, Montgomery, Alabama 36103.

Done this 26th day of April, 1971

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States
Attorney

* * * * *

STIPULATION

The parties hereto, by and through their undersigned counsel of record, stipulate as follows:

1. Sharron Frontiero is 23 years of age and is a First Lieutenant in the United States Air Force.

She is a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama. Lt. Frontiero was married to Joseph Frontiero, 24 years of age, on December 27, 1969. They presently reside together as man and wife at 509 South Court Street, Montgomery, Alabama.

2. Melvin R. Laird is Secretary of Defense.

3. Robert C. Seamans, Jr. is Secretary of the Air Force.

4. Charles G. Weber is the Commanding Officer at Maxwell Air Force Base, Alabama.

5. Joseph Frontiero is a full time student at Huntingdon College, Montgomery, Alabama.

6. Sharron Frontiero and Joseph Frontiero have household expenses totaling approximately $325.50 per month. This total includes approximately $131.00 for rent; $100.00 for food; $30.00 for utilities; $2.50 for house insurance; and $60.00 for automobile transportaion.

7. Joseph Frontiero has personal expenses totaling approximately $192.07 per month. The total of $192.07

per month for Joseph Frontiero's personal expenses includes approximately $12.50 for clothing; $10.83 for insurance; $133.33 tuition; $18.75 for lab fees; and $16.66 for recreation.

8. Joseph Frontiero's total expenses are approximately $354.00 per month. This total is composed of $162.00 (his share of household expenses (50%)), and $192.00, the amount of his personal expenses.

9. Joseph Frontiero has income totaling approximately $235.00 per month. This income included $205.00 received in veterans benefits and $30.00 income from a part time job.

10. In order to obtain the $205.00 per month in veterans benefits which he received, Joseph Frontiero has claimed his wife as a "dependent."

11. Plaintiff Sharron Frontiero filed a complaint with the Inspector General claiming basic allowance for quarters as more fully appears in Exhibit "D" to the complaint herein. She is not aware if said complaint has ever been considered by the Air Force Board for the Correction of Military Records.

Respectfully submitted,

SHARRON A. FRONTIERO AND
JOSEPH FRONTIERO, Plaintiffs

LEVIN AND DEES

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.
Attorneys for Plaintiffs

IRA DE MENT
United States Attorney

By: s/ F. E. Leonard, Jr.
Assistant United States
Attorney
Attorneys for Defendants

* * * * *

AMENDED STIPULATION

The stipulation previously filed in this cause is amended by adding the attached Interrogatories of Plaintiffs and the Defendants' Answers thereto.

Done this 20th day of May, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By s/ Joseph J. Levin, Jr.

ATTORNEYS FOR PLAINTIFFS

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR., for
Defendants

INTERROGATORIES

TO: MELVIN R. LARID, His successors and assigns

Plaintiffs request that the aforenamed Defendant, or any party whom he or the Department of Defense shall designate as being capable and authorized to disclose such information, answer, in accordance with Rule 33, FRCP, the follwing interrogatories:

1. (a) How many females are members of the United States Air Force?

(b) Of these how many are married?

(c) Of those married how many provide more than half the total financial support for their families?

(d) Of those married how many provide the sole financial support for their families?

(e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family?

2. (a) How many males are members of the United States Air Force?

(b) (c) (d) Answer as in question #1 as those questions relate to males in the Air Force.

3. (a) How many females are members of the United States armed services as a whole? ("Armed services" defined as those groups whose members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403.

(b) (c) (d) (e) Answer as in Question #1.

4. (a) (b) (c) (d) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

PLEASE TAKE NOTICE that a copy of such answers is

to be served upon the undersigned within fifteen (15) days after the service of the interrogatories.

Interrogatories served on Defendant by personally delivering the same to counsel for the United States, Assistant U. S. Attorney, F. E. Leonard, Jr., on this the 30th day of March, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.

ATTORNEY FOR PLAINTIFFS

ANSWERS TO INTERROGATORIES

Defendants, by their undersigned attorney, based on information presently available to him in his files, answers the Interrogatories propounded by Plaintiffs' attorney to Defendant Secretary of Defense Melvin R. Laird, on information and belief, as follows:

INTERROGATORY NO. 1. (a) How many females are members of the United States Air Force?

ANSWER: 4,644 officers and 10,659 enlisted women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (b) Of these how many are married?

ANSWER: 736 officers and 1,262 enlisted married women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (c) Of those married how many provide the sole financial support for their families?

ANSWER: Defendants do not know.

INTERROGATORY NO. 1. (e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family.

ANSWER: Defendants do not know.

INTERROGATORY NO. 2. (a) How many males are members of the United States Air Force?

ANSWER: 123,676 officers and 616,163 enlisted men

were members of the United Air Force on 31 December 1970.

INTERROGATORY NO. 2. (b) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: 102,114 officers and 368,227 onlisted married men were members of the United States Air Force on 31 December 1970.

INTERROGATORIES NOS. 2. (c) and (d) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 3. (a) How many females are members of the United States armed services as a whole? ("Armed Services" defined as those groups whose members' rights are governed by the statues drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403.

ANSWER: 8,778 officers and 29,873 enlisted women were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 3. (b) Answer as in question #1.

ANSWER: 935 officers and 3,218 enlisted married women were members of the Army, Navy, Air Force and Marine Corps on 31 December 1970.

INTERROGATORIES NOS. 3. (c) and (d) Answer as in question #1.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 4. (a) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 378,891 officers and 2,442,783 enlisted men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 4. (b) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 207,772 officers and 1,231,980 enlisted married men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORIES NO. 4. (c) and (d) Answer as in question #2 substituting "armed services as a whole"

for "Air Force."

ANSWER: Defendants do not know.

Dated this 23rd day of April, 1971.

IRA DeMENT
United States Attorney

s/ F. E. Leonard, Jr.
F. E. LEONARD
Assistant United States Attorney

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF
Litigation Division, Office of The Judge Advocate General, USAF

City of Washington)
) ss
District of Columbia)

C. Claude Teagarden, being first duly sworn, deposes and says: I am the Chief, Personnel Litigation Branch, Litigation Division, Office of The Judge Advocate General of the United States Air Force, an attorney, and am responsible within the Departments of Defense and the Air Force for the

management of the defense of the above entitled cause.

The statements contained in the foregoing Answers To Interrogatories Proupounded by Plaintiffs (dated 30 March 1971 and received by defendants 6 April 1971) are true to the best of my knowledge and belief, based upon the information contained in the files available to me.

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF

s/ Caroline Wiewara
NOTARY PUBLIC

Caroline Wieware
Notary Public
My Commission Expires Jan 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answers to Interrogatories Propounded by Plaintffs 30 March 1971 and Received by Defendants 6 April 1971, on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087,

Montgomery, Alabama 36103.

Done this 26th day of April, 1971

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States
Attorney

* * * * *

OPINION
ON MOTION TO DISSOLVE
THREE-JUDGE COURT

PER CURIAM:

In support of their motion to dissolve the three-judge court, the defendants make two arguments: (1) that it is impossible for an injunction to issue here; (2) that the constitutional question presented is insubstantial.

I. Can injunctive relief be granted for plaintiffs?

A three-judge district court is not required where a federal statute cannot be put under an equity decree, where there can be no interdiction of a statutory scheme. Flemming v. Nestor, 1960, 363 U.S. 603; Garment Workers' Union v. Donnelly Garment Co., 1938,

304 U.S. 243.

Plaintiffs' opposition brief does a convincing job in distinguishing the cases relied on by defendants in support of their contention that no injunctive relief can possibly issue in this case.

In Flemming v. Nestor, supra, and Gruenwald v. Gardner, 2 Cir. 1968, 390 F.2d 591, parts of the Social Security Act were challenged but no injunctive relief was sought. (In Gruenwald, declaratory relief was sought.) Plaintiffs argue that the review statue of the Social Security Act does not allow for injunctions nor class action. This seems correct.

42 U.S.C. Sections 405 creates the structure under which social security benefit claims are to be handled. Section 405 (h) makes the review provided by section 405 (g) exclusive. The latter section permits judicial review of the Secretary's findings, and it is difficult to see how a class action could arise when only determinations of individual cases are reviewable. Furthermore, the judiciary's power to review is limited by the following sentence: "The

court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary***." This language seems not to allow for injunctive relief.

Garment Workers v. Donnelly Co., supra, and Peterson v. Clark, N.D. Calif. 1968, 285 F. Supp. 693, stand for the rule that a plaintiff may not anticipate a defense in his pleadings. If he seeks an injunction against a statute which he feels the defendant will raise as a defense, the law is clear that the anticipated defense is mere surplusage, and does not call for the impaneling of a three-judge court.

There are some statutes which the courts are powerless to enjoin. The social security cases discussed above furnish one example where there may be no authorization to hear prayers for injunctive relief. Another example is the statutory prohibition from hearing challenges to the selective service law prior to induction.

In Peterson v. Clark, supra, Peterson challenged the constitutionality of 50 U.S.C. app. Section 460 (b) (3) which prohibits pre-induction judicial review of his selective service classification. The court's opinion dissolving the three-judge court followed Garment Workers v. Donnelly Co., supra, in holding that the plaintiff was raising the constitutional issue as an anticipated defense, but also felt Flemming v. Noster, supra, was controlling in that no federal statute would be put under an equity decree. If the court were to hold 50 U.S.C. App. Section 460 (b) (3) unconstitutional, it would merely give the court jurisdiction; no injunction would be issued.

The statutes which the plaintiffs here challenge do appear subject to be enjoined.

10 U.S.C. Section 1072:

"In section 1071-1085 of this title:

* * * * * * *

"(2) 'Dependent,' with respect to member or former member of a uniformed service, means--

"(A) the wife;

* * * * * * *

"(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support."

37 U.S.C. Section 401:

"In this chapter, 'dependent,' with respect to member of a uniformed service, means--

"(1)his spouse;

"(2)his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either--

"(A) is under 21 years of age; or

"(B) is incapable of self-support becuase of a memtal or physical incapacity, and in fact dependent on the member for over one-half of his support; and

"(3)his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at

least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a step-parent and his stepchild is terminated by the stepparent's divorce from the parent by blood." The other statutes sought to be enjoined, 10 U.S.C. Section 1076 and 37 U.S.C. Section 403, and the Air Force Regulation 30-20, utilize the above definitions of "dependent" in setting out entitlement to medical care and housing benefits.

Since the plaintiffs have brought a class action specifically requesting an injunction restraining the enforcement, operation or execution of Acts of Congress, a three-judge court is required where there is no statute prohibiting such releif and where

injunction can be an appropriate form of relief.

It is comforting to note that if we should be mistaken in holding that a three-judge court is required, our error will be harmless in the event the judge to whom the application for injunction was presented joins with one or both of the other judges in this Court's ultimate decision. Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 1941, 312 U.S. 621, 626; Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707,713.

II. Is the constitutional question insubstantial?

The basis for defendants' argument is Bailey v. Patterson, 1962, 369 U.S. 31. The rule is well settled that if the federal question has already been litigated to the extent that it is "foreclosed as a litigable issue," a three-judge court is not needed.

Defendants cite several cases dealing with both state and federal law which upheld a legislative classification based on sex if it was supported by a rational basis.

Whether a "rational basis" is sufficient to meet due process requirements does not appear to be very well settled in sex classification cases.

The defendants have not made such convincing argument that the issue of challenges to legislative sex classification via due process rights is so foreclosed by prior litigation as to make the constitutional question presented insubstantial.

An order is entered denying the defendants' motion to dissolve the three-judge court.

This the 14th day of June 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ Frank M. Johnson, Jr.
United States District Judge

s/ Frank H. McFadden
United States District Judge

* * * * *

ORDER
ON MOTION TO DISSOLVE
THREE-JUDGE COURT

It is ORDERED by the Court that the motion of the defendants to dissolve the three-judge court convened pursuant to the order of the Chief Judge of the Fifth Circuit, dated January 5, 1971, be and the same is hereby DENIED.

Done this 14th day of June 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ Frank M. Johnson, Jr.
United States District Judge

s/ Frank H. McFadden
United States District Judge

* * * * *

Opinion and Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

vs.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Before RIVES, *Circuit Judge*, and JOHNSON and MCFADDEN, *District Judges.*

RIVES, *Circuit Judge*, and MCFADDEN, *District Judge*:

Plaintiffs attack the constitutionality of 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, insofar as these statutes require different treatment for male as opposed to female members of the uniformed services, and seek to require the defendants to cause plaintiff Lt. Sharron A. Frontiero to receive the same quarters allowance and medical and dental

benefits for her spouse as a male member would receive for his spouse.

"Dependent" is defined in 10 U.S.C. § 1072 and 37 U.S.C. § 401. The statutes provide that dependents of any member of the uniformed services be furnished medical and dental care (10 U.S.C. § 1076) and that members with dependents receive an increased allotment for quarters (37 U.S.C. § 403). Under the statutes, members are allowed to designate a particular person as a dependent in the following instances:

(1) A married male member may claim his wife and any unmarried, legitimate, minor children regardless of whether those persons are dependents in fact.

(2) A married female member may claim her husband and any unmarried, legitimate, minor children upon a showing that they are in fact dependent on her for more than one-half of their support, except that, as to medical and dental care a female member may claim such minor children as dependents without regard to whether they are in fact dependent.

(3) Upon a showing of actual dependency any member may claim adult children, parents, and parents-in-law who are incapable of self support because of mental or physical incapacity.

The crucial difference between the treatment of male and of female members is that with respect to quarters' allowance and medical benefits for the spouse of a female member there must be a showing of actual dependency, whereas this showing is not required for male members.

Plaintiffs seek a declaration that this differentiation is unconstitutional and constitutes a discrimination in viola-

tion of the Due Process Clause of the Fifth Amendment to the United States Constitution; a permanent injunction against the enforcement of these provisions with respect to them and members of their class; and an award of back pay for dependency allowances previously denied Lt. Frontiero.

This case is before the Court for decision upon an agreed statement of facts consisting of a stipulation filed May 20, 1971, and an amended stipulation filed May 24, 1971.

Plaintiff, First Lieutenant Sharron A. Frontiero, USAF, a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama, is married to plaintiff Joseph Frontiero, a full-time student at Huntingdon College, Montgomery, Alabama. Joseph Frontiero's living expenses, including his share of household expenses total approximately $354.00 per month. He receives $205.00 per month in veterans' benefits. It is clear, therefore, that Joseph Frontiero is not dependent on Lt. Sharron A. Frontiero for more than one-half of his support. Accordingly, Lt. Frontiero's requests for quarters allowance and medical benefits have been denied. Before reaching the merits of plaintiffs' claim, two preliminary matters must be decided.

First, defendants contend that plaintiffs have no standing to maintain this action because Joseph Frontiero has previously claimed Sharron A. Frontiero as a dependent for purposes of certain veterans' benefits. Defendants rely on *Fahey* v. *Mallonee*, 332 U.S. 245, 255 (1947), where the United States Supreme Court said:

> . . . It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important

conditions." *United States* v. *San Francisco*, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In *Fahey*, the conflicting claims involved only one Act. Defendants contend, however, that the statutory schemes here in question, and the veterans' benefits provisions under which Mr. Frontiero claimed Lt. Frontiero as a dependent, are sufficiently similar in nature that the announced rule in *Fahey* ought to apply.

The provisions under which Joseph Frontiero receives his veterans' benefits are found in 38 U.S.C. §§ 1651, *et seq.* Section 1651 provides:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

The statutory scheme under which Joseph Frontiero receives veterans' benefits is part of Chapter 34 which is de-

nominated as "Veterans' Educational Assistance" and which is in turn a part of Title 38, entitled "Veterans' Benefits."

Title 37 U.S.C., wherein lie the schemes here challenged by Lt. Frontiero, is styled "Pay and Allowances of Uniformed Services." Title 37 does not contain an elaborate statement of purpose, but it is clear that Chapter 7, of which Section 403 is a part, is intended to confer certain benefits on current members of the uniformed services. And, Title 10 U.S.C. § 1071 provides:

> The purpose of sections 1071-1087 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

The statute under which Joseph Frontiero receives $205.00 per month is primarily designed to provide assistance to veterans, although one of its stated purposes is to enhance service in the armed forces. On the other hand, 37 U.S.C. § 403 and 10 U.S.C. § 1072 concern benefits to be bestowed upon present and certain former members of the uniformed services, and the stated purpose in Section 1071 is the creation and maintenance of high morale among present members. Therefore, we conclude that the provisions of 38 U.S.C. §§ 1651, *et seq.*, relating to veterans' educational benefits, and 37 U.S.C. § 403 and 10 U.S.C. § 1072, relating primarily to benefits for present members, are sufficiently distinct as to render the *Fahey* doctrine inapposite.

Second, defendants ask this Court to invoke an estoppel doctrine, relying primarily on *Holly Hill Citrus Growers' Ass'n* v. *Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935), where the Court said:

> There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did.

Defendants contend that because Joseph Frontiero has claimed Sharron Frontiero as a dependent for the veterans' benefits, plaintiffs are estopped from claiming him as her dependent under the military pay and allowances statutes.

We do not agree. The amount of the educational assistance allowance for veterans is based upon the number of dependents of the recipient. 38 U.S.C. § 1682. The definition of "dependent" in the Veterans' Benefits Act (38 U.S.C. § 1652) includes the wife of an eligible veteran without regard to her dependence in fact. When Joseph Frontiero claimed his wife as a dependent for the veterans' benefits, he was not warranting her dependence in fact. Rather, he was merely certifying that he was married and that, by the terms of the statute, he therefore had a dependent. In this case plaintiffs ask that the presumption of dependency be extended to female members claiming their husbands as dependents for purposes of medical benefits and quarters' allotment. If such relief were granted the effect would be to excise any notion of dependency in fact from the statutory scheme. As such the force of the statute would be to

give additional pay to all married members without regard to the actual dependency of their spouses. In that light there would be nothing inconsistent in Joseph Frontiero's claiming Sharron as a dependent while at the same time Sharron claimed Joseph. Thus, we conclude that plaintiffs have not taken such an inconsistent position that they are estopped by the *Holly Hill* doctrine.

Inasmuch as we reject the argument that plaintiffs lack standing and are estopped to challenge the provisions under scrutiny, the case is ripe to be disposed of on the merits.

Plaintiffs point out that a male member may claim his wife without proving her actual dependency, while a female member must prove such in order to claim her husband. At first blush, then, the statute seems to draw a classification entirely on the basis of sex. Such is not the case. Rather than focus attention solely to the different treatment afforded male and female members claiming their respective spouses, we must examine the over-all statutory scheme. A conclusive presumption of dependency is extended in the following instances:

(1) *To male members* claiming spouses and unmarried, legitimate, minor children; and

(2) *to female members* claiming unmarried, legitimate, minor children for purposes of medical and dental benefits.

On the other hand, dependency in fact must be shown:

(1) *By male members* claiming adult children, parents, and parents-in-law; and

(2) *by female members* claiming anyone other than an unmarried, legitimate, minor child for medical and dental benefits.

Thus, on the whole the availability of the presumption does not turn exclusively on the basis of the member's sex but rather on the nature of the relationship between the member and the claimed dependent.[1] In some circumstances male and female members are afforded benefit of the presumption. In others no member can utilize the presumption. As such, this Court is of the view that the statutory scheme as a whole does not differentiate invidiously on the basis of sex. Perforce, then, there is no abridgment of the Constitution.

Yet even if we were to view this case in the narrow context invited by plaintiffs' approach, viz., the different treatment accorded a male member claiming his wife as a dependent and a female member claiming her husband, we would uphold the statute. Before moving to that discussion, however, it is necessary to clarify the standards by which we judge the statute.

An Act of Congress carries with it a strong presumption of constitutionality and places the burden upon the challenging party to prove the unconstitutionality of the statute at issue. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The Due Process Clause of the Fifth Amendment, on which this challenge is based, bars federal legislation embodying a baseless classification. *Galvan* v. *Press*, 347 U.S. 522 (1954). Undoubtedly there is much similarity between the equal protection test which courts employ in determining the validity of a state statute and the due process test which is utilized in evaluating a

[1] We have concluded that Congress chose to employ a presumption of dependency in certain instances for reasons of administrative and economic convenience. That such a justification is sound is treated *infra* pp. 11a-13a.

federal statute. Indeed, it seems sound to say that if a statute comports with notions of equal protection it also satisfies the requisites of substantive due process. And in at least two cases the Supreme Court has tested federal statutes in terms of the standards made applicable to state acts through the equal protection clause of the Fourteenth Amendment. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909). Thus, in determining the constitutionality of the statutory scheme which plaintiffs attack, this Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end.[2] In making that judgment, the statute must be upheld "if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts." *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970) (challenge to a federal tax statute) (emphasis supplied).

The Supreme Court has recently enunciated the test for determining whether a classification squares with the Equal Protection Clause of the Fourteenth Amendment:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis,"

[2] In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court was faced with a challenge to a state law which allegedly discriminated on the basis of sex. In stating the test by which to judge that statute, the Court did not require that it meet the compelling interest test, see Shapiro v. Thompson, 394 U.S. 618 (1969), but rather that it satisfy the rational connection standard. Similarly, in this case we would be remiss in applying the compelling interest test.

it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . . ."

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970).

In summary, the law is well-settled that a statutory classification, challenged as an unlawful discrimination, should be upheld if it has a rational basis.

The defendants contend that the statutory provisions here at issue do no more than establish a conclusive presumption that a married male member of the uniformed services has a dependent wife while requiring a married female member of the uniformed services to prove the dependency of her husband, a distinction which, they say, "does no more than take account of facts which the courts and statistical studies evidence in no way discriminates [sic] against females, as such." It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. The question presented here then is whether the price for enjoying this administrative benefit fails to justify the different treatment of married service women.

The legislative purpose of the provisions of 37 U.S.C. § 403 is to reimburse members of the uniformed services for the expense of furnishing shelter to their dependents. See *Adams* v. *United States*, 65 F.Supp. 86 (Ct. Cl. 1946). Similarly, the object of 10 U.S.C. § 1076 is to provide medical and dental care to dependents of members of the uniformed service. The classification which establishes a conclusive presumption in favor of married service men claiming wives allows the uniformed services to carry out these statutory purposes with a considerable saving of administrative expense and manpower. Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.[3] Such a presumption made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams* v. *City of Milwaukee*, 228 U.S. 572 (1913). "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (dictum). Nothing in the instant statutory classification jeopardizes the ability of a female member to obtain the benefits intended to be bestowed upon her by the statutes. The classification is burdensome for a female member who is not actually providing over one-half the support for her claimed husband only to the extent that were she a man

[3] It should be remembered that for purposes of medical and dental benefits the presumption of dependency is extended to a female member claiming any unmarried minor, legitimate children. And on the other hand a male member must prove actual dependency when he claims adult children, parents, or parents-in-law who by reason of incapacity are unable to support themselves.

she could receive dependency benefits in spite of the fact that her spouse might not be actually dependent, as that term has been defined by Congress. In other words, the alleged injustice of the distinction lies in the possibility that some married service men are getting "windfall" payments, while married service women are denied them. Sharron Frontiero is one of the service women thus denied a windfall.

All dependency benefits are unquestionably valuable, windfalls or not, but we are of the opinion that the incidental bestowal of some undeserved benefits on male members of the uniformed services does not so unreasonably burden female members that the administrative classification should be ruled unconstitutional. Under the stipulated facts, a contrary finding would be unjustifiably broad; it would necessarily be predicated on the reasoning that any classification established to enhance administration of the laws must operate with complete accuracy, that is, without providing any windfalls that are not equally available to members of all classes. The dilemma such a sweeping rule would produce is illustrated dramatically in the instant situation. The Court would be faced with a Hobson-like choice in fashioning a remedy: either strike down the conclusive presumption in favor of married service men, forcing the services to invest the added time and expense necessary to administer the law accurately, or require the presumption to be applied to both male and female married members, thereby abandoning completely the concept of dependency in fact upon which Congress intended to base the extension of benefits.

But the Congress is under no such strict constitutional mandate as it attempts to organize and supervise an efficient and beneficent national government:

> A classification having some reasonable basis does not offend [equal protection] merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Morey v. *Doud*, 354 U.S. 457, 463 (1957), *quoting Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). See *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463 (1941). Nor does the equal protection guarantee of the Constitution steadfastly demand the impracticable. *Perley* v. *North Carolina*, 249 U.S. 510 (1919). *Accord, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Similarly, due process does not command absolute equality.

This is not to say that if plaintiffs could prove that the rational basis—administrative and economic convenience—did not exist due process would nevertheless be satisfied. *Tot* v. *United States*, 319 U.S. 463 (1943). But the plaintiffs here have not come close to proving such a state of facts. There is no evidence before this Court proving that so many male members are in fact dependent on their wives as to make it advisable to deny male members the presumption of dependency. Nor is there proof that so many female members have dependent husbands as to justify extending the benefit of the presumption to them. We take no position on the effect of such a factual showing, particularly in light of our above-stated rationale that the statutory scheme considered as a whole does not differentiate invidiously on the basis of sex, but merely point out that the absence of such proof weakens plaintiffs' case.

Moreover, the result we here reach is clearly in harmony with the recent Supreme Court decision in *Reed* v. *Reed*, 404 U.S. 71 (1971), to strike down, as violative of the

Equal Protection Clause of the Fourteenth Amendment, an Idaho statute which discriminated against women. The statute there in question established a conclusive presumption that the father of a deceased child is more suitable than the mother to serve as administrator of the child's estate. The Supreme Court held that such a classification had no lawful justification:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated *solely* on the basis of sex.

Id. at 76 (emphasis supplied). As we have noted the classification here at issue is not drawn solely on the basis of sex, as was the case in *Reed*. Second, while there is arguably some similarity between the administrative advantage of avoiding probate hearing and the administrative benefit of not having to determine the actual dependency of over a million service wives, there is a significant qualitative distinction. In *Reed* there was a statutory presumption which had no relation to the statutory pur-

pose of selecting the best qualified administrator. The effect was to exclude certain qualified females from serving as administrators, whereas the classification presented here does not exclude qualified female members. They merely have to show actual dependency.

This Court would be remiss if it failed to notice, lurking behind the scenes, a subtler injury purportedly inflicted on service women as a subclass under these statutes. That is the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having to traverse the added red tape of proving her husband's dependency, and, most significantly, of being treated differently. The Court is not insensitive to the seriousness of these grievances, but it is of the opinion that they are mistaken wrongs, the result of a misunderstanding of the statutory purpose. The classifications established by these statutes are purely administrative and economic ones, which are only based in part on sex. There is no reason to believe that the Congress would not respond to a significant change in the practical circumstances presumed by the statutory classification or that the present statutory scheme is merely a child of Congress' "romantic paternalism" and "Victorianism." See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

Having concluded that the statutory scheme on a whole is not one which classifies on the basis of sex and that there is a rational basis for the different treatment accorded male and female members in the narrow context of their attempt to claim spouses, we are compelled to the conclusion that the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and that

they are in all respects constitutional. The relief prayed for is therefore denied.

Done this the 5th day of April, 1972.

RICHARD T. RIVES
United States Circuit Judge

United States District Judge

FRANK H. MCFADDEN
United States District Judge

JOHNSON, *District Judge*, dissenting:

Since the majority depicts this case as it does, the conclusion it reaches is not only easy, it is foregone. However, I am in basic disagreement with the majority's characterization of this litigation and the judicial approach which is thus required.

As an initial point, I take issue with the majority's conclusion that the classification under attack here is not based solely on sex. The majority says that one cannot look merely to the challenged provisions; rather the entire statutory scheme must be examined. Since in some other areas of the statutory scheme men and women are treated equally, the majority argues that the scheme as a whole is acceptable. But simply because a series of related statutes is sexually nondiscriminatory does not necessarily mean that the part of the statutes here being challenged is nondiscriminatory. The fact that the dependency of minor children for purposes of medical and dental care, for example, is determined equally for men and women has

nothing to do with whether the distinction made between men and women with regard to the dependency of their spouses is constitutional.

This Court recognizes that the challenged statutes and regulations are part of a comprehensive statutory matrix. This is so whether the provisions were passed simultaneously or were enacted intermittently over a long period of time. Yet the fact that those provisions which differentiate between men and women are part of such a statutory framework does not *ipso facto* rid those distinctions of constitutional infirmity. To emphasize, because a statute is constitutional in one respect does not preclude an examination into whether some other facet is constitutional. In other words, the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case.

The plaintiffs' case deals solely with the precise question of whether Congress may legitimately distinguish between men and women in the manner in which their spouses' dependency is established. Rather than taking the traditional judicial approach of narrowing the issue, the majority expands the context of this case all out of proportion to the plaintiffs' complaint. Consequently, the majority's approach is not only illogical but is contrary to established notions of judicial perspective.

The majority further concludes that even within the narrow confines of plaintiffs' actual case, the challenged differentiation between men and women is constitutionally permissible. This determination is premised on a finding of "administrative convenience." Without consideration of the propriety of disposing of an important constitutional issue on a basis which no party has advanced and with regard to which we have no proof, I am forced to conclude that this second argument is as faulty as the first.

The majority argues that the reason for providing a conclusive presumption of dependency for males was a desire by Congress to avoid the administrative imbroglio of requiring actual proof from some 200,000 officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. Yet plaintiffs in this case do not attack nor do they seek to end the presumption in favor of males. Rather, they take issue with the statutes' requirement that they and members of their class demonstrate actual dependency. Plaintiffs would probably concede that there is some administrative convenience in granting all married servicemen the conclusive presumption that their spouses are dependent. But except to the extent that it is necessary to illustrate the disparity of treatment between men and women, plaintiffs have demonstrated no concern whatever for the statutes' treatment of males. It is the discriminatory application of the statutes to females that is the crux of this action.

If it is administratively convenient to provide a conclusive presumption for men, it is inconsistent to require a demonstration of dependency in fact for women. The administrative convenience, supposed or real, in providing men with a conclusive presumption of dependency is simply irrelevant to this case. The question is whether it is administratively convenient to require women to demonstrate dependency in fact. From the majority's reasoning, the answer must be clearly in the negative because it is easier just to grant the presumption. Thus, on the strength of the majority's logic, there can be no rational basis.

It may be that the majority attaches a broader meaning to administrative convenience than simply the ease or cost of distribution of benefits. It appears that the majority

would include the denial of benefits to women whose husbands are not dependent in fact in the determination of costs to the Government. Yet it seems incongruous to say that the justification for denying the benefits is that it is cheaper not to give them. That reasoning begs the question of whether there is a rational basis for distinguishing between men and women. If all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain.

Even assuming the correctness of the majority view that administrative convenience may properly include the denial of potential benefits, the recent case of *Reed* v. *Reed*, 404 U.S. 71 (1971), clearly states that such a basis is constitutionally insufficient.[1] In *Reed* the statute gave a mandatory preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The clear objective of the provision was to avoid hearings on the merits when persons of different sex, but otherwise equal entitlement, sought to be administrator of an estate. In rejecting the sufficiency of the argument of administrative convenience the Court replied:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question,

[1] Although *Reed* involved a state statute and was decided on the basis of the Equal Protection Clause of the Fourteenth Amendment, there is no doubt that the analysis used in that case is applicable here. *See Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969), *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; . . . Id. at 76.

The basic message which comes from this case is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. Rather, whatever governmental benefit that can be supposed should be balanced with the impact upon the subject class and the arbitrariness of the classification.

The majority contends that to grant plaintiffs the relief they seek, that is to end the requirement that women demonstrate their spouses' dependency in fact, would dictate the complete abandonment of the congressional scheme for the extension of benefits.

This conclusion is simply incorrect since plaintiffs wish to change only a part of the scheme. Those provisions relating to the dependency of children, parents and others would remain intact. This result is far short of a complete abandonment of the statutory scheme. The severability clauses included when Titles 10 and 37 were enacted relieve this Court of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions. See Savings and Separability Provisions, Section 49 of Act August 10, 1956, c. 1041, 70A Stat. 640, and Savings and Severability Provisions, Section 12 of Pub. L. 87-649, September 7, 1962, 76 Stat. 497.

The majority seeks to minimize the impact and arbitrariness of the classification by characterizing the benefits which plaintiffs seek as a "windfall." This argument smacks of the long-discredited right-privilege dichotomy. When the Government determines to extend benefits, it must do so in a reasonable manner. *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). The attachment of a moral connotation to the benefits which plaintiffs ask adds nothing to the analysis and again begs the question.

Accordingly, I conclude that the statutes and regulations here in issue are unconstitutional and I therefore dissent.

Done, this the 5th day of April, 1972.

FRANK JOHNSON, JR.
United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Come now Sharron A. Frontiero and Joseph Frontiero, Plaintiffs in the above styled cause, by and through their attorney, Joseph J. Levin, Jr., and hereby give notice of appeal and do appeal to the United States Supreme Court from the order and judgment of this Court filed April 5, 1972, wherein this Court denied all relief sought by said Plaintiffs. Said appeal is taken pursuant to 28 U. S. C. Section 1253.

DONE this 26th day of April, 1972.

JOSEPH J. LEVIN, JR.
Attorney for Plaintiffs

Statutes and Regulations Involved

Title 37 U.S.C. Section 401:

Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469.

Title 37 U.S.C. Section 403:

Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	*Without dependents*	*With dependents*
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00
E-4 (over 4 years' service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than 4 years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if,

because of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, §10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718, §§49 (a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, §1(3), Dec. 16, 1967, 81 Stat. 651.

Title 10 U.S.C. Section 1072:

Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secre-

tary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

Title 10 U.S.C. Section 1076:

Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member or former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training) may,

upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242. Dependents of Female Member

a. *Husband.* The law does not recognize the husband of a female member as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. His monthly income must be less, and her monthly contribution more than one-half of his average monthly expenses. The usual household expenses (such as rent, or if they own their own home, real estate taxes, mortgage payments, cost of operating the family car, etc.) constitute joint expenses and are divided equally between them. Only unusual personal expenses, such as medical, actually and necessarily incurred by the husband, are considered as individual expenses. A female member who voluntarily assumes support of her husband to permit him to attend college, although he is physically and mentally capable of self-support, is not considered to have a husband who is in fact dependent on her for over one-half of his support.

b. *Child.* A female member is entitled to BAQ for a minor child only when the child is in fact dependent upon her for over one-half of his support.

c. *Other Dependents.* Conditions of dependency of a child over 21 years of age or a parent are the same as for a male member.

d. *Determinations of Dependency.* Determinations concerning dependents of female members are made by the authorities designated in Table 3-2-1 or 3-2-2.

71-1694

Supreme Court, U.
FILED
JUN 26 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

JOSEPH LEVIN
LEVIN & DEES
P.O. Box 2087
Montgomery, Alabama 36103
Attorneys for Appellants

INDEX

PAGE

JURISDICTIONAL STATEMENT

Opinion Below 2

Jurisdiction 2

Statutes and Regulations Involved 3

Question Presented 3

Statement of the Case 3

The Question Is Substantial 6

CONCLUSION 17

APPENDIX

Opinion and Judgment 1a

Notice of Appeal 22a

Statutes and Regulations Involved 23a

TABLE OF AUTHORITIES

Cases:

Bolling v. Sharpe, 347 U.S. 497 (1954) 7

Bullock v. Carter, 40 U.S.L.W. 4211 (U.S. Feb. 24, 1972) 8, 14

DeKosenko v. Brandt, 63 Misc.2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970) 10

Duley v. Caterpillar Tractor Co., 411 Ill.2d 15, 253 N.E.2d 373 (1969) 10

PAGE

Eisenstadt v. Baird, 40 U.S.L.W. 4303 (U.S. Mar. 22, 1972) 9
Eslinger v. Thomas, 324 F. Supp. 1329 (D.S.C. 1971) 10

F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 8
Frontiero v. Laird, —— F. Supp. —— (M.D. Ala. 1972) 11

Goldblatt v. Board of Education, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) 10
Graham v. Richardson, 403 U.S. 365 (1971) 7

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 8
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 2

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1939) 15

Jacobsen v. Lenhart, 300 Ill.2d 225, 195 N.E.2d 638 (1968) 10

Katzenbach v. McClung, 379 U.S. 294 (1964) 2
Korematsu v. United States, 323 U.S. 214 (1944) 8

Levy v. Louisiana, 391 U.S. 68 (1968) 14, 15

McLaughlin v. Florida, 379 U.S. 184 (1964) 8
Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir.), *cert. denied*, 393 U.S. 1066 (1968) 10

PAGE

Reed v. Reed, 404 U.S. 71 (1971) 7, 9, 11, 12, 14

Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529 (1971) 13
Schneider v. Rusk, 377 U.S. 163 (1964) 7
Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952) .. 8
Shapiro v. Thompson, 394 U.S. 618 (1969) 7
Speiser v. Randall, 357 U.S. 513 (1958) 15
Stanley v. Illinois, 40 U.S.L.W. 4371 (U.S. Apr. 3, 1972) 11-12

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) 8

Weber v. Aetna Casualty and Surety Co., 40 U.S.L.W. 4460 (U.S. Apr. 24, 1972) 7, 14, 15
Welsh v. United States, 398 U.S. 333 (1970) 7, 15

Constitutional Provisions:

United States Constitution

Fifth Amendment 3, 5, 7, 16
Fourteenth Amendment 7, 16

Statutes:

10 U.S.C. §1072 ..... 2, 3, 5, 6, 9
10 U.S.C. §1076 ..... 2, 3, 5, 6, 9
10 U.S.C. §8215 13

28 U.S.C. §1253 2
28 U.S.C. §2282 2
28 U.S.C. §2284 2

PAGE

37 U.S.C. §401 ..... 2, 3, 4, 6, 8
37 U.S.C. §403 ..... 2, 3, 4, 6, 8

Regulations:

Air Force Manual 36-5, Dept. of Air Force, Sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (September 30, 1970) 13

Department of Defense Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) 3, 4

Other Authorities:

116 Cong. Rec. 117953 (daily ed. August 10, 1970) 16
Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) 8
2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1939 (5th ed. 1891) 16
Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971) 16, 17
Note, Are Sex-Based Classifications Constitutionally Suspect? 66 Nw. U. L. Rev. 481 (1971) 13
THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE, Table 5-I, p. 51, Table A-II, p. 181 (1970) 10
U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on Earnings Gap 1 (December, 1971) (median for 1970) 10
U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today 4 (1971) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Middle District of Alabama, Northern Division, entered on April 5, 1972, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the Middle District of Alabama, Northern Division, has not yet been reported. It is set out in the Appendix, *infra*, pp. 1a-21a.

Jurisdiction

This action to declare unconstitutional and to restrain the enforcement of Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, insofar as they require different treatment for female as opposed to male members of the uniformed services, originated through a complaint filed by appellants in the United States District Court for the Middle District of Alabama, Northern Division, on December 23, 1970. Pursuant to Title 28 U.S.C. Sections 2282 and 2284, a three-judge district court was convened to hear and determine the action. On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972. App., *infra*, p. 22a.

The jurisdiction of the Supreme Court to review this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Statutes and Regulations Involved

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Appendix, *infra*, p. 23a *et seq.*

Question Presented

Whether the classification according to sex made by Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more than one-half of his support, violates the due process clause of the Fifth Amendment to the United States Constitution.

Statement of the Case

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remains a full-time student at Huntington College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $354.00 per month. With the exception of $205.00 per month which appellant Joseph

Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters—BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of their wives' actual financial dependency. The statute sets up a different definition of dependency for female armed forces members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.[1]

Sections 401 and 403 as applied to women are supplemented by Department of Defense regulations set out in Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) (App., *infra*, p. 30a). Pursuant to these regulations a male spouse does not qualify as a dependent even if he is in fact dependent upon his wife for more than one-half of his support, unless he is physically or mentally incapable of self-support. Moreover, the regulations provide that "a female member, who voluntarily assumes support of her husband to permit him to attend college . . . is not considered to have a husband who is in fact dependent upon her . . . ."

---

[1] Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. Complaint, para. III (2).

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter, appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance.

Under Title 10 U.S.C., Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the Armed Forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support. (*See* App., *infra*, pp. 27a-29a.) Appellant Sharron Frontiero seeks extension of these benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate the due process clause of the Fifth Amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." App., *infra*, pp. 15a-16a. In arriving at its decision the Court below declared that:

> . . . [T]his Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end. App., *infra*, p. 9a.

The Court found the necessary "rational connection" by relying upon Congress' conclusive presumption in favor of married servicemen, the purpose of which was "to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them." App., *infra*, p. 10a.

Appellants appeal from this decision by the three-judge district court.

The Question Is Substantial

Title 10 U.S.C. Sections 1072 and 1076, and Title 37 U.S.C. Sections 401 and 403, classify spouses of male uniformed services members as "dependents" whether or not they are in fact; these same sections classify spouses of female members as "dependents" only if the husband is in fact dependent on his wife for more than one-half of his support. Further, regulations issued pursuant to these statutes disqualify even wholly dependent spouses of fe-

male members unless they are mentally or physically incapable of self-support. App., *infra*, p. 30a. Underscoring the stark double standard embodied in this scheme, the regulations state explicitly that a servicewoman who assumes support of a husband attending college does not have a dependent spouse; a serviceman whose wife is capable of self-support but spends her days attending college continues automatically to receive full dependency allowances. App., *infra*, p. 30a.

This sex-based classification, established for a purpose unrelated to any biological difference between the sexes, violates the due process clause of the Fifth Amendment for it arbitrarily and capriciously discriminates against women as a class.[2] *Reed* v. *Reed*, 404 U.S. 71 (1971).

It is beyond debate that the concept of equal protection forbids not only racial discrimination but discrimination against other groups set apart by unalterable conditions of birth that are unrelated to individual capacity. *Weber* v. *Aetna Casualty and Surety Co.*, 40 U.S.L.W. 4460, 4463 (U.S. Apr. 24, 1972); *Reed* v. *Reed, supra; Graham* v. *Richardson*, 403 U.S. 365, 371-74 (1971).

In determining whether a particular statute or governmental action violates the concept of equal protection, the courts have developed standards of review ranging from

---

[2] The Fifth Amendment's due process clause imposes no less an obligation upon the federal government than the Fourteenth Amendment's equal protection clause does upon the states. *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). *See also* Brief for Appellee at 28, *Welsh* v. *United States*, 398 U.S. 333 (1970) (federal government's affirmation that "equal protection" notion, implicit in the Fifth Amendment, precludes Congress from acting arbitrarily . . . or from engaging in invidious discrimination).

lenient to stringent. *See Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969). In some cases a test of reasonable classification has been applied: does the classification established by the legislature bear a reasonable relation to the permissible objective of the legislation? Under this general test, if the purpose of the statute is permissible and if the statutory classification bears the required fair relationship to that purpose, the constitutional requirement will be satisfied. *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

In two circumstances a more stringent test is applied. When the "statutory classifications approach sensitive and fundamental personal rights," *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 667, 670 (1966), or when the statute classifies on a basis "inherently suspect," the courts will subject the legislation to the most rigid scrutiny. Thus, a statute distinguishing on the basis of race or ancestry embodies a "suspect or invidious" classification and, unless supported by the most compelling affirmative justification, will not pass constitutional muster. *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Sei Fujii* v. *State,* 38 Cal.2d 718, 730, 242 P.2d, 617, 625 (1952).

A third, intermediate standard of review was applied in *Bullock* v. *Carter,* 40 U.S.L.W. 4211, 4214 (U.S. Feb. 24, 1972). Mr. Chief Justice Burger, writing for the majority, declared that an inequity challenged under the equal protection principle "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."

Appellants' position in this case is three-fold: (1) the sex line drawn by 37 U.S.C. Sections 401 and 403, and 10 U.S.C.

Sections 1072 and 1076, establishes a suspect classification for which no compelling justification can be shown; alternatively (2) the sex line at issue, closely scrutinized, is not reasonably necessary to the accomplishment of legitimate government objectives; and, finally (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing servicewomen from servicemen, lacks the constitutionally required fair and reasonable relation to a permissible congressional objective.

I.

a. The majority below considered the "reasonable relationship" test applicable and upheld the statutory and regulatory scheme on the ground that it served the purpose of "administrative convenience." In the majority's words:

> Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependence than to extend the presumption of dependency to such members. . . . App., *infra,* p. 11a.

The majority plainly stated the basis of its selection of the most lenient standard of review. The court thought that under *Reed* a lower court "would be remiss" in subjecting sex-based classifications to closer scrutiny. See App., *infra,* p. 9a n.2. Overlooked was Mr. Justice Brennan's explanation in *Eisenstadt* v. *Baird,* 40 U.S.L.W. 4303, 4306 n.7 (U.S. Mar. 22, 1972), that the Court in *Reed* did not reach the question whether a stricter standard should be applied in sex discrimination cases because the Idaho statute at issue there "fail[ed] to satisfy even the more

lenient equal protection standard." Thus, this Court's reservation of the standard question for another day was misread as a mandate to lower courts to apply a lenient test in cases challenging sex-based classifications.[3]

b. In the administration of public affairs, convenience is a virtue so long as it does not supersede the fundamental right of individuals to even-handed application of governmental action. But the policy embodied in the statutes and regulations at bar is applied in a way which is grossly unfair to women.

The median income of a man in the armed forces is $3683 per year.[4] The median earnings of civilian women working full time is $5323 per year.[5] Therefore, it is likely that most men serving in the armed forces who are married to working women[6] earn less then their wives and under

---

[3] The decision of the court below is typical of the confusion exhibited by many lower courts, both state and federal, as to the proper standard of review in sex discrimination cases. See, *e.g.*, *Miskunas* v. *Union Carbide Corp.*, 399 F.2d 847 (7th Cir.), *cert. denied*, 393 U.S. 1066 (1968); *Eslinger* v. *Thomas*, 324 F. Supp. 1329 (D.S.C. 1971); *Duley* v. *Caterpillar Tractor Co.*, 411 Ill.2d 15, 253 N.E.2d 373 (1969); *Jacobsen* v. *Lenhart*, 300 Ill.2d 225, 195 N.E.2d 638 (1968); *DeKosenko* v. *Brandt*, 63 Misc.2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970); *Goldblatt* v. *Board of Education*, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968).

[4] THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE, Table 5-I at p. 51, Table A-II at p. 181 (1970).

[5] U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on the Earnings Gap 1 (December, 1971) (median for 1970).

[6] Almost three-fifths of all women workers are married and living with their husbands; forty-six percent of all married women whose husbands earn between $5,000 and $6,999 are in the labor force. U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today 4 (1971).

the standard suggested below by appellees,[1] such men would be dependent on their wives. Any even-handed pursuit of a dependency criterion would distinguish between military men whose wives are gainfully employed and those whose wives are not, and require the former to prove the dependency of their spouses in the same way that women in the uniformed services are now required to prove the dependency of theirs.

c. While this Court left open the question of the appropriate standard of review in sex discrimination cases, the decision in *Reed* spoke directly to "administrative convenience" as a basis for establishing the rationality of sex-based classifications: "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . ." 404 U.S. at 76-77. As Judge Johnson stated in his dissent in the case at bar:

> The basic message which comes from [the *Reed* case] is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. App., *infra*, p. 20a.

In the case at bar, as in *Reed*, acceptance of the administrative convenience rationale would require approval of sex-role stereotyping as a legitimate basis for legislative distinction. As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In *Stanley* v. *Illinois*, 40 U.S.L.W. 4371 (U.S. Apr.

---

[1] Defendant's Memorandum Brief at pp. 9-10, *Frontiero* v. *Laird*, —— F. Supp. —— (M.D. Ala. 1972).

3, 1972), this Court declared unconstitutional legislation based on the administratively convenient assumption that unwed fathers do not wish responsibility for children. Significantly, in *Stanley*, the barrier was not "insurmountable," for under the legislation at issue there an unwed father could affirmatively prove his qualification in an adoption or guardianship proceeding. But the Court held that he should not be subjected to a standard more onerous than that applicable to other parents. Similarly, in the case at bar a married female member of the uniformed services should not be held to a requirement more onerous than that applicable to a married male member of the uniformed services.

Since a classification based on an administratively convenient group stereotype cannot rank as a fair and reasonable method in pursuit of a permissible legislative objective, the decision below founders under the test applied in *Reed* and similarly should be struck down.

II.

The conclusion of the majority of the district court "that there is a rational basis for the different treatment accorded male and female members [of the uniformed services]," App., *infra*, p. 15a, rests on the very kind of double standard this Court rejected in *Reed*. Assuming, *arguendo*, that the district court correctly construed the "rational relationship" test, the court was remiss in failing to go on to scrutinize the legislative scheme more closely: it should have identified sex as a "suspect" criterion and determined whether any "compelling state interest" justifies the classification.

A clear statement of the basis of the suspect classification doctrine has been provided by the California Supreme

Court in a decision declaring that sex falls squarely within the scope of the doctrine:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classification is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . *Sail'er Inn, Inc.*, v. *Kirby*, 5 Cal.3d 1, 18, 485 P.2d 529, 540 (1971).

See also Note, Are Sex-Based Classifications Constitutionally Suspect? 66 Nw. U. L. Rev. 481 (1971).

The kind of classification at issue here should be subject to the same strict scrutiny as an analogous race classification. For example, a police department that required a high school diploma as a prerequisite to admission into its police academy would not be permitted, on the basis of the statistical fact that a lower percentage of blacks than whites have completed high school, to ask only black applicants about their educational background.[8]

---

[8] The observation of the California Supreme Court in *Sail'er Inn, supra*, that women as a class "are relegated to an inferior legal status" is amply illustrated by their treatment in the uniformed services. Apart from the discrimination in allowances once women enter the military, they are subjected in the first instance to a statutory quota drastically limiting their opportunity for entry. *See* Title 10 U.S.C. Section 8215 (women enlistees and officers may not constitute more than 2% of the Regular Air Force). For other qualifications applied to women but not to men, *see* AIR FORCE MANUAL 36-5, Dept. of Air Force, sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (September 30, 1970).

III.

At the very least the court below should have applied a standard similar to the one delineated by this Court in *Bullock* v. *Carter, supra.* It is well documented that sex discrimination permeates society at every level and is often reinforced by government sanction.[9] Statutes benefiting men in ways that women are not benefited should be "closely scrutinized" with the burden on the proponent of discrimination to establish that the sex-based classification is "necessary to the accomplishment of legitimate government objectives." Applying this standard, it should be clear that the sex distinction involved in the scheme here at issue "do[es] not pass constitutional muster."

IV.

The court below thought it would face a "Hobson-like choice" in fashioning a remedy if it determined that the sex classification did not comport with the equal protection principle. Should it extend housing and medical benefits to the husbands of servicewomen, or should it require servicemen to prove actual dependency of their wives? This Court's decisions should have made the appropriate resolution evident. For example, in *Levy* v. *Louisiana,* 391 U.S. 68 (1968) and *Weber* v. *Aetna Casualty and Surety Co., supra,* where dependency definitions singled out a certain group for unconstitutional treatment, the Court saved the statutes by striking the offending disqualification, thus extending to the plaintiffs the benefits accorded the larger group similarly situated. Nor is the propriety of extension of benefits a recent judicial discovery. As succinctly stated

[9] See Brief for Appellant, *Reed* v. *Reed, supra,* pp. 69-88.

by Mr. Justice Brandeis over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1939), the legislature eventually may decide to remove the benefit from all, but in the meantime, the court must extend it to the unconstitutionally excluded class. *See also* Mr. Justice Harlan's concurring opinion in *Welsh* v. *U. S.*, 398 U.S. 333, 344, 355-67 (1970). The remedial route in this case is charted with particular clarity since the legislative history irrefutably establishes that these benefits were intended to "create and maintain high morale" among men and women in the armed forces. App., *infra*, p. 5a.

V.

The majority below characterized the claim of women for benefits granted to similarly situated men as a plea for a "windfall." App., *infra*, p. 12a. As Judge Johnson noted in his dissent [citing *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958)], the "windfall" characterization smacks of the long-discredited right-privilege dichotomy." App., *infra*, p. 21a. This Court repeatedly has held that statutorily created benefits must be distributed with an even hand. See *Levy* v. *Louisiana, supra; Weber* v. *Aetna Casualty & Surety Co., supra.*[10]

VI.

The recent overwhelming approval of the Equal Rights Amendment to the United States Constitution, confirming

[10] It might be worth considering whether the "windfall" argument would have held any appeal for the court below had the group excluded from the "windfall" been defined in terms of race, religion or national origin.

the dominant intent of Congress to bar sex discrimination, does not in any way affect protection against such discrimination already afforded by the Fifth and Fourteenth Amendments.

The final approval of the Equal Rights Amendment by Congress on March 22, 1972, is of particular significance to the claim asserted by appellants. In the course of the debate on the Amendment, Congress made clear that enlightened construction and application of the Fifth and Fourteenth Amendments would amply secure equality of rights and responsibilities between the sexes. Nonetheless, Congress wished to provide further assurances so there would not be the slightest doubt that the right of all persons to equal treatment under the law without any distinction as to sex would be recognized as fundamental constitutional principle.[11] Representative Martha Griffiths, on the day the House of Representatives passed the Equal Rights Amendment for the first time, stated:

> There never was a time when decisions of the Supreme Court (under the Fifth and Fourteenth Amendments) could not have done everything we ask today. 116 Cong. Rec. H7953 (daily ed. August 10, 1970).

In Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 676 (1971), two legal scholars examined the record of the judiciary in sex discrimination cases; they concluded that the performance of American judges in this area "can be suc-

---

[11] *Cf.* 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1939 (5th ed. 1891): "(T)he repetition of securities (for individual rights) may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist."

cinctly described as ranging from poor to abominable. With some notable exceptions . . . [judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as 'racist'. . . . [But] 'sexism'—the making of unjustifiable assumptions about social roles solely on the basis of sex differences—is as discernible in contemporary judicial opinions as racism ever was." The majority decision below ranks with the catalogue described in Johnston and Knapp.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

JOSEPH LEVIN
LEVIN & DEES
P.O. Box 2087
Montgomery, Alabama 36103
Attorneys for Appellants

June 26, 1972.

Opinion and Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Before RIVES, *Circuit Judge,* and JOHNSON and MCFADDEN, *District Judges.*

RIVES, *Circuit Judge,* and MCFADDEN, *District Judge*:

Plaintiffs attack the constitutionality of 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, insofar as these statutes require different treatment for male as opposed to female members of the uniformed services, and seek to require the defendants to cause plaintiff Lt. Sharron A. Frontiero to receive the same quarters allowance and medical and dental

benefits for her spouse as a male member would receive for his spouse.

"Dependent" is defined in 10 U.S.C. § 1072 and 37 U.S.C. § 401. The statutes provide that dependents of any member of the uniformed services be furnished medical and dental care (10 U.S.C. § 1076) and that members with dependents receive an increased allotment for quarters (37 U.S.C. § 403). Under the statutes, members are allowed to designate a particular person as a dependent in the following instances:

(1) A married male member may claim his wife and any unmarried, legitimate, minor children regardless of whether those persons are dependents in fact.

(2) A married female member may claim her husband and any unmarried, legitimate, minor children upon a showing that they are in fact dependent on her for more than one-half of their support, except that, as to medical and dental care a female member may claim such minor children as dependents without regard to whether they are in fact dependent.

(3) Upon a showing of actual dependency any member may claim adult children, parents, and parents-in-law who are incapable of self support because of mental or physical incapacity.

The crucial difference between the treatment of male and of female members is that with respect to quarters' allowance and medical benefits for the spouse of a female member there must be a showing of actual dependency, whereas this showing is not required for male members.

Plaintiffs seek a declaration that this differentiation is unconstitutional and constitutes a discrimination in viola-

tion of the Due Process Clause of the Fifth Amendment to the United States Constitution; a permanent injunction against the enforcement of these provisions with respect to them and members of their class; and an award of back pay for dependency allowances previously denied Lt. Frontiero.

This case is before the Court for decision upon an agreed statement of facts consisting of a stipulation filed May 20, 1971, and an amended stipulation filed May 24, 1971.

Plaintiff, First Lieutenant Sharron A. Frontiero, USAF, a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama, is married to plaintiff Joseph Frontiero, a full-time student at Huntingdon College, Montgomery, Alabama. Joseph Frontiero's living expenses, including his share of household expenses total approximately $354.00 per month. He receives $205.00 per month in veterans' benefits. It is clear, therefore, that Joseph Frontiero is not dependent on Lt. Sharron A. Frontiero for more than one-half of his support. Accordingly, Lt. Frontiero's requests for quarters allowance and medical benefits have been denied. Before reaching the merits of plaintiffs' claim, two preliminary matters must be decided.

First, defendants contend that plaintiffs have no standing to maintain this action because Joseph Frontiero has previously claimed Sharron A. Frontiero as a dependent for purposes of certain veterans' benefits. Defendants rely on *Fahey* v. *Mallonee*, 332 U.S. 245, 255 (1947), where the United States Supreme Court said:

> . . . It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important

conditions." *United States* v. *San Francisco*, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In *Fahey*, the conflicting claims involved only one Act. Defendants contend, however, that the statutory schemes here in question, and the veterans' benefits provisions under which Mr. Frontiero claimed Lt. Frontiero as a dependent, are sufficiently similar in nature that the announced rule in *Fahey* ought to apply.

The provisions under which Joseph Frontiero receives his veterans' benefits are found in 38 U.S.C. §§ 1651, *et seq.* Section 1651 provides:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

The statutory scheme under which Joseph Frontiero receives veterans' benefits is part of Chapter 34 which is de-

nominated as "Veterans' Educational Assistance" and which is in turn a part of Title 38, entitled "Veterans' Benefits."

Title 37 U.S.C., wherein lie the schemes here challenged by Lt. Frontiero, is styled "Pay and Allowances of Uniformed Services." Title 37 does not contain an elaborate statement of purpose, but it is clear that Chapter 7, of which Section 403 is a part, is intended to confer certain benefits on current members of the uniformed services. And, Title 10 U.S.C. § 1071 provides:

> The purpose of sections 1071-1087 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

The statute under which Joseph Frontiero receives $205.00 per month is primarily designed to provide assistance to veterans, although one of its stated purposes is to enhance service in the armed forces. On the other hand, 37 U.S.C. § 403 and 10 U.S.C. § 1072 concern benefits to be bestowed upon present and certain former members of the uniformed services, and the stated purpose in Section 1071 is the creation and maintenance of high morale among present members. Therefore, we conclude that the provisions of 38 U.S.C. §§ 1651, *et seq.*, relating to veterans' educational benefits, and 37 U.S.C. § 403 and 10 U.S.C. § 1072, relating primarily to benefits for present members, are sufficiently distinct as to render the *Fahey* doctrine inapposite.

Second, defendants ask this Court to invoke an estoppel doctrine, relying primarily on *Holly Hill Citrus Growers' Ass'n* v. *Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935), where the Court said:

> There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did.

Defendants contend that because Joseph Frontiero has claimed Sharron Frontiero as a dependent for the veterans' benefits, plaintiffs are estopped from claiming him as her dependent under the military pay and allowances statutes.

We do not agree. The amount of the educational assistance allowance for veterans is based upon the number of dependents of the recipient. 38 U.S.C. § 1682. The definition of "dependent" in the Veterans' Benefits Act (38 U.S.C. § 1652) includes the wife of an eligible veteran without regard to her dependence in fact. When Joseph Frontiero claimed his wife as a dependent for the veterans' benefits, he was not warranting her dependence in fact. Rather, he was merely certifying that he was married and that, by the terms of the statute, he therefore had a dependent. In this case plaintiffs ask that the presumption of dependency be extended to female members claiming their husbands as dependents for purposes of medical benefits and quarters' allotment. If such relief were granted the effect would be to excise any notion of dependency in fact from the statutory scheme. As such the force of the statute would be to

give additional pay to all married members without regard to the actual dependency of their spouses. In that light there would be nothing inconsistent in Joseph Frontiero's claiming Sharron as a dependent while at the same time Sharron claimed Joseph. Thus, we conclude that plaintiffs have not taken such an inconsistent position that they are estopped by the *Holly Hill,* doctrine.

Inasmuch as we reject the argument that plaintiffs lack standing and are estopped to challenge the provisions under scrutiny, the case is ripe to be disposed of on the merits.

Plaintiffs point out that a male member may claim his wife without proving her actual dependency, while a female member must prove such in order to claim her husband. At first blush, then, the statute seems to draw a classification entirely on the basis of sex. Such is not the case. Rather than focus attention solely to the different treatment afforded male and female members claiming their respective spouses, we must examine the over-all statutory scheme. A conclusive presumption of dependency is extended in the following instances:

(1) *To male members* claiming spouses and unmarried, legitimate, minor children; and

(2) *to female members* claiming unmarried, legitimate, minor children for purposes of medical and dental benefits.

On the other hand, dependency in fact must be shown:

(1) *By male members* claiming adult children, parents, and parents-in-law; and

(2) *by female members* claiming anyone other than an unmarried, legitimate, minor child for medical and dental benefits.

Thus, on the whole the availability of the presumption does not turn exclusively on the basis of the member's sex but rather on the nature of the relationship between the member and the claimed dependent.[1] In some circumstances male and female members are afforded benefit of the presumption. In others no member can utilize the presumption. As such, this Court is of the view that the statutory scheme as a whole does not differentiate invidiously on the basis of sex. Perforce, then, there is no abridgment of the Constitution.

Yet even if we were to view this case in the narrow context invited by plaintiffs' approach, viz., the different treatment accorded a male member claiming his wife as a dependent and a female member claiming her husband, we would uphold the statute. Before moving to that discussion, however, it is necessary to clarify the standards by which we judge the statute.

An Act of Congress carries with it a strong presumption of constitutionality and places the burden upon the challenging party to prove the unconstitutionality of the statute at issue. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The Due Process Clause of the Fifth Amendment, on which this challenge is based, bars federal legislation embodying a baseless classification. *Galvan* v. *Press*, 347 U.S. 522 (1954). Undoubtedly there is much similarity between the equal protection test which courts employ in determining the validity of a state statute and the due process test which is utilized in evaluating a

[1] We have concluded that Congress chose to employ a presumption of dependency in certain instances for reasons of administrative and economic convenience. That such a justification is sound is treated *infra* pp. 11a-13a.

federal statute. Indeed, it seems sound to say that if a statute comports with notions of equal protection it also satisfies the requisites of substantive due process. And in at least two cases the Supreme Court has tested federal statutes in terms of the standards made applicable to state acts through the equal protection clause of the Fourteenth Amendment. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909). Thus, in determining the constitutionality of the statutory scheme which plaintiffs attack, this Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end.[3] In making that judgment, the statute must be upheld "if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts." *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970) (challenge to a federal tax statute) (emphasis supplied).

The Supreme Court has recently enunciated the test for determining whether a classification squares with the Equal Protection Clause of the Fourteenth Amendment:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis,"

[3] In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court was faced with a challenge to a state law which allegedly discriminated on the basis of sex. In stating the test by which to judge that statute, the Court did not require that it meet the compelling interest test, see Shapiro v. Thompson, 394 U.S. 618 (1969), but rather that it satisfy the rational connection standard. Similarly, in this case we would be remiss in applying the compelling interest test.

> it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . . ."

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970).

In summary, the law is well-settled that a statutory classification, challenged as an unlawful discrimination, should be upheld if it has a rational basis.

The defendants contend that the statutory provisions here at issue do no more than establish a conclusive presumption that a married male member of the uniformed services has a dependent wife while requiring a married female member of the uniformed services to prove the dependency of her husband, a distinction which, they say, "does no more than take account of facts which the courts and statistical studies evidence in no way discriminates [sic] against females, as such." It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. The question presented here then is whether the price for enjoying this administrative benefit fails to justify the different treatment of married service women.

The legislative purpose of the provisions of 37 U.S.C. § 403 is to reimburse members of the uniformed services for the expense of furnishing shelter to their dependents. See *Adams* v. *United States*, 65 F.Supp. 86 (Ct. Cl. 1946). Similarly, the object of 10 U.S.C. § 1076 is to provide medical and dental care to dependents of members of the uniformed service. The classification which establishes a conclusive presumption in favor of married service men claiming wives allows the uniformed services to carry out these statutory purposes with a considerable saving of administrative expense and manpower. Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.[3] Such a presumption made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams* v. *City of Milwaukee*, 228 U.S. 572 (1913). "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (dictum). Nothing in the instant statutory classification jeopardizes the ability of a female member to obtain the benefits intended to be bestowed upon her by the statutes. The classification is burdensome for a female member who is not actually providing over one-half the support for her claimed husband only to the extent that were she a man

[3] It should be remembered that for purposes of medical and dental benefits the presumption of dependency is extended to a female member claiming any unmarried minor, legitimate children. And on the other hand a male member must prove actual dependency when he claims adult children, parents, or parents-in-law who by reason of incapacity are unable to support themselves.

she could receive dependency benefits in spite of the fact that her spouse might not be actually dependent, as that term has been defined by Congress. In other words, the alleged injustice of the distinction lies in the possibility that some married service men are getting "windfall" payments, while married service women are denied them. Sharron Frontiero is one of the service women thus denied a windfall.

All dependency benefits are unquestionably valuable, windfalls or not, but we are of the opinion that the incidental bestowal of some undeserved benefits on male members of the uniformed services does not so unreasonably burden female members that the administrative classification should be ruled unconstitutional. Under the stipulated facts, a contrary finding would be unjustifiably broad; it would necessarily be predicated on the reasoning that any classification established to enhance administration of the laws must operate with complete accuracy, that is, without providing any windfalls that are not equally available to members of all classes. The dilemma such a sweeping rule would produce is illustrated dramatically in the instant situation. The Court would be faced with a Hobson-like choice in fashioning a remedy: either strike down the conclusive presumption in favor of married service men, forcing the services to invest the added time and expense necessary to administer the law accurately, or require the presumption to be applied to both male and female married members, thereby abandoning completely the concept of dependency in fact upon which Congress intended to base the extension of benefits.

But the Congress is under no such strict constitutional mandate as it attempts to organize and supervise an efficient and beneficent national government:

> A classification having some reasonable basis does not offend [equal protection] merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Morey v. *Doud*, 354 U.S. 457, 463 (1957), *quoting Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). See *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463 (1941). Nor does the equal protection guarantee of the Constitution steadfastly demand the impracticable. *Perley* v. *North Carolina*, 249 U.S. 510 (1919). *Accord, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Similarly, due process does not command absolute equality.

This is not to say that if plaintiffs could prove that the rational basis—administrative and economic convenience—did not exist due process would nevertheless be satisfied. *Tot* v. *United States*, 319 U.S. 463 (1943). But the plaintiffs here have not come close to proving such a state of facts. There is no evidence before this Court proving that so many male members are in fact dependent on their wives as to make it advisable to deny male members the presumption of dependency. Nor is there proof that so many female members have dependent husbands as to justify extending the benefit of the presumption to them. We take no position on the effect of such a factual showing, particularly in light of our above-stated rationale that the statutory scheme considered as a whole does not differentiate invidiously on the basis of sex, but merely point out that the absence of such proof weakens plaintiffs' case.

Moreover, the result we here reach is clearly in harmony with the recent Supreme Court decision in *Reed* v. *Reed*, 404 U.S. 71 (1971), to strike down, as violative of the

Equal Protection Clause of the Fourteenth Amendment, an Idaho statute which discriminated against women. The statute there in question established a conclusive presumption that the father of a deceased child is more suitable than the mother to serve as administrator of the child's estate. The Supreme Court held that such a classification had no lawful justification:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated *solely* on the basis of sex.

Id. at 76 (emphasis supplied). As we have noted the classification here at issue is not drawn solely on the basis of sex, as was the case in *Reed*. Second, while there is arguably some similarity between the administrative advantage of avoiding probate hearing and the administrative benefit of not having to determine the actual dependency of over a million service wives, there is a significant qualitative distinction. In *Reed* there was a statutory presumption which had no relation to the statutory pur-

pose of selecting the best qualified administrator. The effect was to exclude certain qualified females from serving as administrators, whereas the classification presented here does not exclude qualified female members. They merely have to show actual dependency.

This Court would be remiss if it failed to notice, lurking behind the scenes, a subtler injury purportedly inflicted on service women as a subclass under these statutes. That is the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having to traverse the added red tape of proving her husband's dependency, and, most significantly, of being treated differently. The Court is not insensitive to the seriousness of these grievances, but it is of the opinion that they are mistaken wrongs, the result of a misunderstanding of the statutory purpose. The classifications established by these statutes are purely administrative and economic ones, which are only based in part on sex. There is no reason to believe that the Congress would not respond to a significant change in the practical circumstances presumed by the statutory classification or that the present statutory scheme is merely a child of Congress' "romantic paternalism" and "Victorianism." See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

Having concluded that the statutory scheme on a whole is not one which classifies on the basis of sex and that there is a rational basis for the different treatment accorded male and female members in the narrow context of their attempt to claim spouses, we are compelled to the conclusion that the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and that

they are in all respects constitutional. The relief prayed for is therefore denied.

Done this the 5th day of April, 1972.

RICHARD T. RIVES
United States Circuit Judge

.....
United States District Judge

FRANK H. MCFADDEN
United States District Judge

JOHNSON, *District Judge*, dissenting:

Since the majority depicts this case as it does, the conclusion it reaches is not only easy, it is foregone. However, I am in basic disagreement with the majority's characterization of this litigation and the judicial approach which is thus required.

As an initial point, I take issue with the majority's conclusion that the classification under attack here is not based solely on sex. The majority says that one cannot look merely to the challenged provisions; rather the entire statutory scheme must be examined. Since in some other areas of the statutory scheme men and women are treated equally, the majority argues that the scheme as a whole is acceptable. But simply because a series of related statutes is sexually nondiscriminatory does not necessarily mean that the part of the statutes here being challenged is nondiscriminatory. The fact that the dependency of minor children for purposes of medical and dental care, for example, is determined equally for men and women has

nothing to do with whether the distinction made between men and women with regard to the dependency of their spouses is constitutional.

This Court recognizes that the challenged statutes and regulations are part of a comprehensive statutory matrix. This is so whether the provisions were passed simultaneously or were enacted intermittently over a long period of time. Yet the fact that those provisions which differentiate between men and women are part of such a statutory framework does not *ipso facto* rid those distinctions of constitutional infirmity. To emphasize, because a statute is constitutional in one respect does not preclude an examination into whether some other facet is constitutional. In other words, the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case.

The plaintiffs' case deals solely with the precise question of whether Congress may legitimately distinguish between men and women in the manner in which their spouses' dependency is established. Rather than taking the traditional judicial approach of narrowing the issue, the majority expands the context of this case all out of proportion to the plaintiffs' complaint. Consequently, the majority's approach is not only illogical but is contrary to established notions of judicial perspective.

The majority further concludes that even within the narrow confines of plaintiffs' actual case, the challenged differentiation between men and women is constitutionally permissible. This determination is premised on a finding of "administrative convenience." Without consideration of the propriety of disposing of an important constitutional issue on a basis which no party has advanced and with regard to which we have no proof, I am forced to conclude that this second argument is as faulty as the first.

The majority argues that the reason for providing a conclusive presumption of dependency for males was a desire by Congress to avoid the administrative imbroglio of requiring actual proof from some 200,000 officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. Yet plaintiffs in this case do not attack nor do they seek to end the presumption in favor of males. Rather, they take issue with the statutes' requirement that they and members of their class demonstrate actual dependency. Plaintiffs would probably concede that there is some administrative convenience in granting all married servicemen the conclusive presumption that their spouses are dependent. But except to the extent that it is necessary to illustrate the disparity of treatment between men and women, plaintiffs have demonstrated no concern whatever for the statutes' treatment of males. It is the discriminatory application of the statutes to females that is the crux of this action.

If it is administratively convenient to provide a conclusive presumption for men, it is inconsistent to require a demonstration of dependency in fact for women. The administrative convenience, supposed or real, in providing men with a conclusive presumption of dependency is simply irrelevant to this case. The question is whether it is administratively convenient to require women to demonstrate dependency in fact. From the majority's reasoning, the answer must be clearly in the negative because it is easier just to grant the presumption. Thus, on the strength of the majority's logic, there can be no rational basis.

It may be that the majority attaches a broader meaning to administrative convenience than simply the ease or cost of distribution of benefits. It appears that the majority

would include the denial of benefits to women whose husbands are not dependent in fact in the determination of costs to the Government. Yet it seems incongruous to say that the justification for denying the benefits is that it is cheaper not to give them. That reasoning begs the question of whether there is a rational basis for distinguishing between men and women. If all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain.

Even assuming the correctness of the majority view that administrative convenience may properly include the denial of potential benefits, the recent case of *Reed* v. *Reed*, 404 U.S. 71 (1971), clearly states that such a basis is constitutionally insufficient.[1] In *Reed* the statute gave a mandatory preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The clear objective of the provision was to avoid hearings on the merits when persons of different sex, but otherwise equal entitlement, sought to be administrator of an estate. In rejecting the sufficiency of the argument of administrative convenience the Court replied:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question,

[1] Although *Reed* involved a state statute and was decided on the basis of the Equal Protection Clause of the Fourteenth Amendment, there is no doubt that the analysis used in that case is applicable here. *See Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969), *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; . . . Id. at 76.

The basic message which comes from this case is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. Rather, whatever governmental benefit that can be supposed should be balanced with the impact upon the subject class and the arbitrariness of the classification.

The majority contends that to grant plaintiffs the relief they seek, that is to end the requirement that women demonstrate their spouses' dependency in fact, would dictate the complete abandonment of the congressional scheme for the extension of benefits.

This conclusion is simply incorrect since plaintiffs wish to change only a part of the scheme. Those provisions relating to the dependency of children, parents and others would remain intact. This result is far short of a complete abandonment of the statutory scheme. The severability clauses included when Titles 10 and 37 were enacted relieve this Court of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions. See Savings and Separability Provisions, Section 49 of Act August 10, 1956, c. 1041, 70A Stat. 640, and Savings and Severability Provisions, Section 12 of Pub. L. 87-649, September 7, 1962, 76 Stat. 497.

The majority seeks to minimize the impact and arbitrariness of the classification by characterizing the benefits which plaintiffs seek as a "windfall." This argument smacks of the long-discredited right-privilege dichotomy. When the Government determines to extend benefits, it must do so in a reasonable manner. *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). The attachment of a moral connotation to the benefits which plaintiffs ask adds nothing to the analysis and again begs the question.

Accordingly, I conclude that the statutes and regulations here in issue are unconstitutional and I therefore dissent.

Done, this the 5th day of April, 1972.

FRANK JOHNSON, JR.
United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Come now Sharron A. Frontiero and Joseph Frontiero, Plaintiffs in the above styled cause, by and through their attorney, Joseph J. Levin, Jr., and hereby give notice of appeal and do appeal to the United States Supreme Court from the order and judgment of this Court filed April 5, 1972, wherein this Court denied all relief sought by said Plaintiffs. Said appeal is taken pursuant to 28 U. S. C. Section 1253.

DONE this 26th day of April, 1972.

JOSEPH J. LEVIN, JR.
Attorney for Plaintiffs

Statutes and Regulations Involved

Title 37 U.S.C. Section 401:

Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469.

Title 37 U.S.C. Section 403:

Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	*Without dependents*	*With dependents*
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00
E-4 (over 4 years' service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than 4 years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if,

because of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, §10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718, §§49 (a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, §1(3), Dec. 16, 1967, 81 Stat. 651.

Title 10 U.S.C. Section 1072:

Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secre-

tary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

Title 10 U.S.C. Section 1076:

Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member or former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training) may,

upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

Department of Defense Military Pay and Allowa Entitlements Manual, Sec. 30242. Dependents of Female Member

a. *Husband.* The law does not recognize the husban a female member as a dependent for BAQ entitlement less he is physically or mentally incapable of self-supp and is in fact dependent upon her for more than one- of his support. His monthly income must be less, and monthly contribution more than one-half of his aver monthly expenses. The usual household expenses (such rent, or if they own their own home, real estate ta mortgage payments, cost of operating the family car, e constitute joint expenses and are divided equally betw them. Only unusual personal expenses, such as medi actually and necessarily incurred by the husband, are c sidered as individual expenses. A female member who untarily assumes support of her husband to permit h to attend college, although he is physically and menta capable of self-support, is not considered to have a husb who is in fact dependent on her for over one-half of h support.

b. *Child.* A female member is entitled to BAQ for minor child only when the child is in fact dependent up her for over one-half of his support.

c. *Other Dependents.* Conditions of dependency of child over 21 years of age or a parent are the same as f a male member.

d. *Determinations of Dependency.* Determinations co cerning dependents of female members are made by t authorities designated in Table 3-2-1 or 3-2-2.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO AND JOSEPH FRONTIERO,
APPELLANTS

v.

MELVIN R. LAIRD, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from a decision of a three-judge district court sustaining the constitutionality of certain federal statutes relating to housing and medical benefits for the dependent spouse of a member of the armed forces. Under 37 U.S.C. 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters." Under 10 U.S.C. 1076 and 1077 a member's dependents are

provided medical and dental care. "Dependent" is defined by 37 U.S.C. 401 and 10 U.S.C. 1072 to include (a) the wife of any male member and (b) the husband of any female member if the husband is in fact dependent on the member for more than one-half of his support.[1] The effect of these statutes is that male members of the armed forces automatically obtain these benefits for their spouses, but female members obtain them only if they contribute more than one-half of their spouse's support.

Pursuant to these statutes, appellant Sharron Frontiero, a lieutenant in the United States Air Force, was denied medical and housing benefits for her husband, appellant Joseph Frontiero, on the ground that her application showed that her husband was not dependent upon her for more than one-half of his support.[2] Appellants brought this suit in the district court challenging the constitutionality of these statutes. Although conceding that Lieutenant Frontiero's husband was not dependent upon her (J.S. App. 3a), appellants argued that these statutes, insofar as they require a female member to demonstrate her spouse's dependency while imposing no such burden upon a male member, unreasonably discriminate on the basis

---

[1] The pertinent statutes and regulations are set forth in the appendix to the Jurisdictional Statement (hereinafter "J.S. App.") pp. 23a–30a.

[2] The regulations promulgated by the Department of Defense (J.S. App. 30a), to which appellants advert (J.S. 4), are thus not at issue in this case, because Lt. Frontiero's application was denied on the statutory ground that her husband was not dependent on her for more than one-half of his support.

of sex, in violation of the Fifth Amendment. Appellants sought a permanent injunction against the enforcement of these statutes and an order directing the appellees to give Lieutenant Frontiero the same housing and medical benefits for her spouse as a male would have received for his spouse.

A three-judge court was convened pursuant to 28 U.S.C. 2282 and 2284. The court (with one judge dissenting) sustained the constitutionality of the statutes (J.S. App. 1a–21a).

ARGUMENT

1. In statutes dealing with economic benefits, a legislative classification must be upheld " 'if any state of facts reasonably may be conceived to justify it'." *Dandridge* v. *Williams,* 397 U.S. 471, 485; *McGowan* v. *Maryland,* 336 U.S. 420, 426. Such a classification is constitutionally infirm only if it is "patently arbitrary" and bears no rational relationship to the objective sought to be advanced by the statute. *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Reed* v. *Reed,* 404 U.S. 71, 76.

Under these criteria, the statutes involved here are constitutional. The challenged classification reasonably implements the legitimate interest of Congress in the effective administration of the dependency benefits program. The legislative scheme, which extends automatic dependency benefits only to male members of the service, obviously reflects the congressional judgment that most wives are dependent upon their husbands. In view of the large number of married male members

of the armed forces[3] and the likelihood that most of their wives are dependent upon them, Congress was justified in concluding that the statutory objectives would best be served by granting benefits to all married male personnel, notwithstanding that a small proportion of servicemen whose wives are not dependent would receive a windfall in the form of unneeded benefits.

In the case of female married members of the Armed Forces, it was not unreasonable for Congress to have concluded that most of their husbands are not dependent and that the federal interest in economical administration of the program would therefore be promoted by examining individually the much smaller number of claims involved. Thus, while female members whose husbands are in fact dependent on them are entitled to benefits, the relatively large percentage whose husbands are not dependent receive no windfall.

Although female members whose spouses are not dependent are treated differently from males whose spouses are not dependent, the classification is a rational one, reasonably related to the legislative objective.[4] The court below properly so held.

---

[3] There are some 1,200,000 married male members of the uniformed services (see J.S. App. 10a).

[4] Cf., *Wells* v. *Civil Service Commission*, 423 Pa. 602, 225 A.2d 554, certiorari denied, 386 U.S. 1035, where the court upheld a requirement that female but not male members of a police force undergo an oral examination for promotion to sergeant, partly on the practical ground that the large number of male applicants made it impossible to subject each to an oral examination.

2. The appellants argue, however, that legislative classifications relating in any way to sex must be subjected to rigid scrutiny and can be sustained only if necessary to the accomplishment of compelling governmental interests. As they acknowledge, however, this strict standard of review has been limited to classifications that either affect sensitive and fundamental personal rights or are inherently suspect (J.S. 8).

Appellants properly refrain from suggesting that the interests here at issue—which are wholly economic—qualify as fundamental rights. See, *e.g.*, *Dandridge* v. *Williams*, *supra*, 397 U.S. at 484.[5] Rather, they argue that, like race and national origin, sex is a "suspect" basis for classification and therefore requires the stricter standard. See, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184; *Korematsu* v. *United States*, 323 U.S. 214.

This Court has never treated classifications based upon sex as inherently suspect.[6] This is because sex,

---

[5] Among the interests that have been identified as fundamental are voting (*Harper* v. *Virginia Board of Elections*, 383 U.S. 663); procreation (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541); interstate travel (*Shapiro* v. *Thompson*, 394 U.S. 618); and marriage (*Loving* v. *Virginia*, 388 U.S. 1).

[6] See, *e.g.*, *Muller* v. *Oregon*, 208 U.S. 412 (upholding statute that limited women's working hours); *Radice* v. *New York*, 264 U.S. 292 (upholding statute forbidding night work by women in restaurants); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding statute that relieved women of jury duty unless they volunteered); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134

though it shares some of the characteristics that make race and national origin suspect as the basis of classifications,[7] also differs from race and lineage in several important respects. Whereas racial or ethnic classifications demark a minority of the population and are commonly perceived as implying assumed inferiority or opprobrium, women comprise a numerical majority and sex classifications are usually founded on physiological or sociological differences, not on social contempt for women.[8] See generally, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1124–1127.

Whatever may be the contemporary validity of these theories, the Congress and the States, which are in a better position than the courts to weigh the broad sociological ramifications of a constitutional rule forbidding sex discrimination, have already embarked upon the task. The Equal Rights Amendment to the Constitution was approved by Congress on March 22,

---

(D.S.C.) (permitting state university to provide separate branches for male and female students). See also *Reed* v. *Reed*, *supra*, where the Court struck down a statutory preference for men as administrators of estates but stated the test in traditional terms as "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced" (404 U.S. at 76).

[7] Each is an immutable and visible characteristic bearing no necessary relation to ability.

[8] The classification here is based not upon an outmoded view of woman's abilities or qualifications but on economic facts and the pertinent administrative and cost considerations. The classification does not represent a mark of implied inferiority or opprobrium.

1972, and has already been ratified by some 20 state legislatures. If that Amendment is adopted, the issue in this case would be in a quite different legal posture. At the present time, however, the district court's application here of familiar constitutional principles does not warrant plenary review by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
ROBERT S. GREENSPAN,
Attorneys.

AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

INDEX

PAGE

Opinion Below 1

Jurisdiction. 2

Question Presented. 3

Statutes Involved 4

Statement of the Case 4

Summary of Argument 9

Argument

I. Introduction. 14

II. The Fourteenth Amendment's Equal Protection Clause Bars State Discrimination Against Women On The Basis of Their Sex 18

III. Concepts Of Equal Protection Found In The Fourteenth Amendment Are Applicable By Implication To The Federal Government Through The Due Process Clause Of The Fifth Amendment 23

IV. The Challenged Statutes Discriminate Solely On The Basis Of Sex. 25

V. Standards Of Review: This Classification Demands Strict Scrutiny. . . . 28

VI. The Government's Justifications For The Discrimination Have No Rational Basis And Are Insubstantial 37

PAGE

VII. The Issues At Bar Are Discreet And Susceptible To Judicial Resolution . 56

VIII. Relief: Benefits Should Be Extended To Women On The Same Basis As To Men 63

Conclusion 67

Addendum 68

TABLE OF AUTHORITIES

Cases:

Adams v. City of Milwaukee, 228 U.S. 572 (1913). 54, 55

Bass v. Mississippi, 381 F.2d 692 (1967) . . 20

Bolling v. Sharpe, 347 U.S. 497 (1954) . .10, 24

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). 13, 59, 60

Buck v. Bell, 274 U.S. 200 (1928). 15

Bullock v. Carter, 405 U.S. 134 (1972) 32, 35, 36

Carrington v. Rash, 380 U.S. 89 (1965). 36, 45, 46, 55

Dandridge v. Williams, 397 U.S. 471 (1970). 39, 50, 55

PAGE

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). 53

Edwards v. California, 314 U.S. 160 (1941) 61

Eisenstadt v. Baird, 405 U.S. 645 (1972). 11, 28, 39

Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.* 405 U.S. 970 (1972). 57

Frontiero v. Laird, 341 F. Supp. 206 (M.D. Ala. 1972). 1

Goesart v. Cleary, 335 U.S. 464 (1948) . . . 29

Graham v. Richardson, 403 U.S. 365 (1971). . 20

Gruenwald v. Gardner, 390 F.2d 591 (2d Cir., 1968), *cert denied* 393 U.S. 982 . 11, 30, 32

Hays v. Florida, 368 U.S. 49 (1961). 29

Heart of Altanta Motel v. United States, 379 U.S. 241 (1964) 3

Hernandez v. Texas, 347 U.S. 476 (1954). . . 19

Helvering v. Lerner Stores Corp., 314 U.S. 463 (1941). 23

Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). 21

Hoyt v. Florida, 368 U.S. 49 (1961). 20, 29, 62

PAGE

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1939) 14, 67

Johnson v. Louisiana, ____U.S.____, 92 S. Ct. 1620 (1972). 24

Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969) 25

Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). 30

Juelich v. U. S. , 403 F.2d 523 (1968) . . . 20

Katzenbach v. McClung, 379 U.S. 294 (1964) . 3

Karczewski v. Baltimore and O.R.R. Co., 274 F. Supp. 169 (N.D. Ill., 1967). . . . 21

King v. Smith, 392 U.S. 309 (1968) 53

Kirstein v. Rector & Visitors of the University of Virginia, 309 F.Supp. 184 (D. Va. 1970) 32

Levy v. Louisiana, 391 U.S. 68 (1968). . . . . 9 , 14, 18, 53, 64

McLaughlin v. Florida, 379 U.S. 184 (1964). 11, 33

Mengelkoch v. Industrial Welfare Commission, 442 F.2d 1119 (9th Cir. 1971) 21

Miskunas v. Union Carbide Co., 399 F.2d 847 (7th Cir. 1968) 21

Muller v. Oregon, 208 U.S. 412 (1908). . .11, 29

PAGE

National Association of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969). . . . 25

Nolin v. Pearson, 191 Mass. 283 (1906) . . . 60

Papachriston v. City of Jacksonville, 405 U.S. 156 (1972) 61

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389. . . . . .33, 46

Railway Express Agency v. New York, 336 U. S. 106, 110 (1949) 34

Reed v. Reed, 404 U.S. 71 (1971) 10, 13, 18, 22, 28, 29, 34, 55, 56

Rinaldi v. Yeager, 384 U.S. 305 (1966) . . 9, 18

Robinson v. York, 281 F. Supp. 8 (D. Conn., (1968). 21

Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P. 2d 529 (S. Ct. Cal. 1971). . . .21, 31

Schneider v. Rusk, 377 U.S. 163 (1964). 9, 18, 25

Schneider v. State, 308 U.S. 147 (1939). . . 53

Seidenburg v. McSorley's Old Ale House, Inc., 308 F.Supp. 1253 (S.D.N.Y., 1969) 21

Shapiro v. Thompson, 394 U.S. 618 (1969). 10, 18, 25, 28, 55, 63

Shelly v. Kraemer, 334 U.S. 1 (1948). . . . 23

PAGE

Sherbert v. Verner, 37 U.S. 398 (1963) . . . 63

Skinner v. Oklahoma, 316 U.S. 535 (1942). 15, 31, 65, 66

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 19

Smith v. United States, 424 F.2d 267 (9th Cir., 1970). 25

South Carolina v. Katzenbach, 383 U.S. 301 (1966). 30, 32

Speiser v. Randall, 357 U.S. 513 (1958). 9, 17, 63

Stanley v. Illinois, 405 U.S. 438 (1972) .10, 23

Strauder v. West Virginia, 100 U.S. 303 (1880). 61

Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *cert granted* 41 LW 3220 (10-24-72) 29

United States v. Cook, 311 F.Supp. 618 (W.D. Pa., 1970). 38

United States v. Dege, 364 U.S. 51 (1960). 13, 58, 60, 62

United States v. Gaston County North Carolina, 395 U.S. 285 (1969) 31, 36

United States v. Horton, 423 F.2d 474 (4th Cir. 1970) 25

PAGE

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972) 9, 17, 35, 40, 66

Welsh v. United States, 398 U.S. 333 (1970) 14, 25, 65

White v. Crook, 251 F. Supp. 401 (M.D. Ala., 1966) 20, 61

Williams v. McNair, 316 F.Supp. 134 (D.S.C., 1970) *aff'd mem.* 401 U.S. 95 (1971) . .11, 32

Williamson v. Lee Optical Co., 348 U.S. 483 (1955). 34

Yick Wo v. Hopkins, 118 U.S. 356 (1886). 17, 19, 27, 46

Constitutional Provisions:

United States Constitution

Fifth Amendment 4, 8, 10, 23, 25
Fourteenth Amendment. . . . . .
. . . . 15, 18, 19, 20, 21, 22, 23, 24, 25

Statutes:

10 U.S.C. § 1072 . . . . . 2, 3, 7, 26, 27, 40
10 U.S.C. § 1076 . . . . . 2, 3, 7, 17, 26, 40
10 U.S.C. § 8215 . . . . . .12, 44

28 U.S.C. § 1253 3
28 U.S.C. § 2282 2
28 U.S.C. § 2284 2

PAGE

37 U.S.C. § 401. . . . . .2, 3, 4, 5, 26, 27, 40
37 U.S.C. § 403. . . . . .2, 3, 4, 5, 17, 26, 40

Equal Employment Opportunity Act of 1972, Public Law 92-261, Sec. 717; 92nc Congress (March 24, 1972) 40 LW 51, 54 (1972) . . . 24

Regulations:

Air Force Manual 36-5, Dept of Air Force, Sections 2-2 (n), 2-13 (d) (2), 3-1 (a) (19) (September 30, 1970) 44

Department of Defense Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) 6

Other Authorities:

CJS, Vol. 41, "Husband and Wife," Sec. 17 . 58

Comment, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality,* 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 260 (1971). 60, 62

Congressional *Record,* 81st Cong., 1st Sess., Vol. 95 . . . . . .42, 43

Congressional *Record,* 81st Cong., 1st Sess., Vol. 102. . . . . .41, .42, 44

Equal Rights for Women: A Symposium, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 215 (1971) . 60

PAGE

Freund, P., *The Equal Rights Amendment Is Not The Way*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 234,235-236 (1971). . . .18, 32

Holmes, Collected Legal Papers, 187 (1920), reprinting *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) 63

Hughes, M., *And Then There Were Two*; 23 Hast. L. J. 233 (1971). 57

Murphy, T., *Female Wage Discrimination*, 39 U. CIN. L. REV. 615 (1970) 30

New York *Times*, p. 1, Col. 1, November 12, 1972. 17

THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE. Table 5-I, p.51, Table A-II, p. 181 (1970). 51, 68, 69

U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on the Earnings Gap 1 (December 1, 1971) (Median for 1970). 51

Van Alstyne, *The Demise of the Rights Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) 64

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

v.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court is reported at 341 F. Supp. 206 (M.D. Ala. 1972).

JURISDICTION

This action to declare unconstitutional and to restrain the enforcement of Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, insofar as they require different treatment for female as opposed to male members of the uniformed services, originated through a complaint filed by appellants in the United States District Court for the Middle District of Alabama, Northern Division, on December 23, 1970. Pursuant to Title 28 U.S.C. Sections 2282 and 2284, a three-judge district court was convened to hear and determine the action. On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgement which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972. (App.22a)

The jurisdiction of the Supreme Court to review

this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Probable jurisdiction was noted by this Court on October 10, 1972, ____ U.S. ____, 41 LW 3165.

QUESTION PRESENTED

Whether the classification according to sex made by Title 37 U.S.C. Sections 401 and 403, and Title 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more

than one-half of his support, violates the due process clause of the Fifth Amendment to the United States Constitution.

STATUTES INVOLVED

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Appendix.

STATEMENT OF THE CASE

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remained a full-time student at Huntingdon College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $345.00 per month. With the exception of $205.00 per month which appellant

Joseph Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters-BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of their wives' actual financial dependency. The statute sets up a different definition of dependency for female service members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.1/

1/ Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. See Appendix p. ii.

Sections 401 and 403 as applied to women are supplemented by Department of Defense regulations set out in Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) (App. 30a). Pursuant to these regulations a male spouse does not qualify as a dependent even if he is in fact dependent upon his wife for more than one-half of his support, unless he is physically or mentally incapable of self-support.

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter,

appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance. (App. 12-13 & 25).

Under Title 10 U.S.C., Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the Armed Forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support. (*See* App. 27a-29a). Appellant Sharron Frontiero seeks extension of these benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate

the due process clause of the Fifth Amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." (App. 15a-16a). In arriving at its decision the Court below declared that:

> . . . [T]his Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end. (App. 9a)

The Court found the necessary "rational connection" by relying upon Congress' conclusive presumption in favor of married servicemen, the purpose of which was "to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives

were actually dependent upon them." (App. 10a)

Appellants appeal from this decision by the three-judge district court.

SUMMARY OF ARGUMENT

When the government compensates and extends benefits to military personnel, it may not do so in disregard of constitutional commands. *Speiser v. Randall*, 357 U.S. 513 (1958). In extending compensation and benefits, the government may not treat differently persons who are similarly circumstanced. Cf. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (equality in providing workmen's compensation benefits), *Levy v. Louisiana*, 391 U.S. 68 (1968) (equality in extending right to sue for wrongful death), *Schneider v. Rusk*, 377 U.S. 163 (1964) (equality in extending the benefits of citizenship). *See also Rinaldi v. Yeager*, 384 U.S. 305 (1966) (equal extension of free transcripts).

This Court last term for the first time found a state statute which discriminated against women to

be unconstitutional. *Reed v. Reed*, 404 U.S. 71 (1971). Cf. *Stanley v. Illinois*, 405 U.S. 438 (1972). The plaintiffs contend that these concepts of equal protection apply equally to activites by the federal government by virtue of the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Schneider v. Rusk*, 377 U.S. 163 (1964), *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969).

The dependency provisions challenged *sub judice* violate this guarantee of equal operation of the laws. The inequality is two-fold:

1) procedurely, women are forced to a greater administrative burden than men, and

2) substantively, males who cannot prove their wives dependent are, by virtue of the non-rebuttable presumption that their wives are dependent, granted additional benefits while women who are in precisely the same circumstance are denied benefits.

Although *Reed v. Reed, supra*, employed the rational basis test to judge a sex classification, the Court

apparently left open the prospect that strict review would be applied in an appropriate case. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 1035 N. 7 (1972). This is such a case. Because the instant classification is neither protectionist *Muller v. Oregon*, 208 U.S. 412 (1908), nor remedial, *Gruenwald v. Gardner*, 390 F.2d 591 (2nd Cir. 1968), *cert. den.* 393 U.S. 982, nor neutral, *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd. mem.* 401 U.S. 95., but rather imposes an additional inequality in an area — employment — where women already suffer from unequal treatment,[2/] this sex classification should be deemed suspect and subjected to strict scrutiny. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

Yet even under the rational basis test the instant classification fails. The defendants first justify the classification on the armed forces' need

---

[2/] Indeed the Government specifically points to income inequality as a basis for the classification. See *infra*, p. 47 *et seq.*

to attract more men than women, but the legislative history of these fringe benefit programs conclusively shows that no such purpose was intended by Congress. Rather Congress intended with these incentives to attract both men and women into re-enlistment.3/

Second, the defendants argue that a desire to lighten their administrative workload justifies the classification *sub judice*. They contend that it is fair to presume males' spouses dependent because women earn less than men. Lt. Frontiero shows in reply that income levels are irrelevant alone in determining dependency. Furthermore, even if lower income level indicates dependency, the armed forces' own statistics show that male military members as a group earn less than civilian females, their wives. But most important, Lt. Frontiero argues that since the classification serves no purpose other than administrative convenience, that purpose alone is in-

---

3/ When Congress has intended to get more men and fewer women into a service branch it has accomplished that purpose with statutory ease. *See, eg.*, 10 U.S.C. 8215.

adequate to justify the discrimination.[4/] *Reed v. Reed, supra.*

The Government and Lt. Frontiero agreed in the lower court that these classifications do not adopt or promote common law rules on familial dependency. Yet while they do not incorporate the common law, plaintiffs suggest that this discrimination draws on a sex stereotype dating from the heyday of the common law. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). The facts which served as the basis for that view have so changed, said Mr. Justice Frankfurter for the Court in *United States v. Dege*, 364 U.S. 51 (1960), that women today cannot be stereotyped as the homebound wife. Indeed, latest Labor Department reports show that at some family income levels almost one-half the wives are full-time

---

[4/] If the Government truly believes that income levels correspond with dependency why not make that the basis for guessing at benefit eligibility? Surely the mere goal of administrative ease could be accomplished by a less drastic means which did not cut such a broad and inaccurate swath as this sex classification. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1939).

members of the work force. (*See infra*, p. 62, n. 65)

Because the discriminatory provision of fringe benefits according to sex is unconstitutional, the instant classification must be struck down. And because striking down the entire benefit program would frustrate Congress' purpose of enticing re-enlistments, Lt. Frontiero takes the position that the defect should be cured by extending the benefits to women on the same basis as they are now granted to men. *Levy v. Louisiana*, 391 U.S. 68 (1968), *Welsh v. United States*, 398 U. S. 333, 355 (1970) (Harlan, J., concurring), *Iowa - Des Moines National Bank v. Bennett*, 284 U.S. 239 (1939) (per Brandeis, J.

For these reasons the decision below should be REVERSED.

ARGUMENT

I.

INTRODUCTION

Long looked upon as "the usual last resort of con-

stitutional arguments,"[5] the Equal Protection Clause has in the last quarter century re-emerged as a prominent tool in the vindication of individual rights. As it became accepted that government could affect and control parts of our lives once privately shaped, it became increasingly necessary that if government was to be given such powers, the Courts must protect against their abuse by requiring their equal application. Compare *Buck v. Bell*, 274 U.S. 200 (1928) with *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In 1949, the same year in which Congress adopted the sex classifications for housing allowances which plaintiffs challenge,[6] Mr. Justice Jackson warned that the

> . . . framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely,

---

[5] Buck v. Bell , 274 U.S. 200, 208 (1928).

[6] See page 40, *infra*.

> nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws will be equal in operation.7/

Lt. Frontiero and her fellow women in the armed forces illustrate these factors well. They recognize Congress' legitimate interest in building up our armed forces for an adequate national defense, with the concommittant growth of medical benefits, housing allowances, and other inducements by which the armed forces compensate their personnel. But as this role of the government has expanded, the women

---

7/ *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson J., concurring), cited with approval in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 1039 (1972).

in the armed forces ask that it be undertaken with an even-hand toward all personnel. Nothing undermines more the morale of our armed forces and opens the door to arbitrary administration than to allow a small minority of personnel — women — to be singled out for different treatment and diminished compensation.[8/] When the government compensates and extends benefits to its military personnel, it may not do so in disregard of constitutional commands. *Speiser v. Randall*, 357 U.S. 513 (1958). The present dependency definitions in 10 U.S.C. 1076 and 37 U.S.C. 403 do precisely that — in extending compensation and benefits they deny women in the armed forces their constitutional right to the "protection of equal laws," *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See, Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400 (1972) (equality in

---

8/ The proposition is amply demonstrated by the current problems in the Navy concerning unequal treatment of blacks. See Admiral Zumwalt's stand admitting and seeking to cure the evil reported in *Navy Set to Bar Race Grievances*, New York TIMES, p. 1, Col. 1, November 12, 1972.

provision of workmen's compensation benefits), *Levy v. Louisiana*, 391 U. S. 68 (1968) (Equality in extending the right to sue), *Schneider v. Rusk*, 377 U. S. 163 (1964) (equality in extending the benefits of citizenship). *See especially Rinaldi v. Yeager*, 384 U.S. 305 (1966) (equal extension of free transcripts). Cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Speiser v. Randall, supra*.[9/]

II.

THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE BARS STATE DISCRIMINATION AGAINST WOMEN ON THE BASIS OF THEIR SEX.

Although passed in specific response to the plight

9/ The pervasiveness of sex discrimination in our society has been poignantly expressed in prior briefs for this Court. *See, eg.*, Brief for Appellant in *Reed v. Reed*, 404 U.S. 71 (1971), at Brief pages 69-88. Professor Ginsburg's scholarship has also convincingly developed the need for Court leadership in this area. *Id.*, text accompanying notes 4-10. *See also* P. Freund, *The Equal Rights Amendment Is Not The Way*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 234, 235-236 (1971). With this backdrop the plaintiffs here limit themselves to showing that the discreet issue now at bar fails to meet the existing strictures of the Constitution.

of newly freed slaves,[10] the Equal Protection Clause has from its early days been read to forbid discrimination against any cognizable community group. *See, eg., Yick Wo v. Hopkins,* 118 U. S. 356 (1886). This Court in *Hernandez v. Texas,* 347 U.S. 476, 478 (1954), recognized that

> [t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static and from time to time other diferences from the community norm define other groups which need the same protection . . . When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some

---

[10] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81, 21 L. Ed. 394, 410 (1873).

reasonable classification, the guarantees of the Constitution have been violated.[11]

The *Hernandez* language is clear and unambiguous — any cognizable group which is subject to classification and different treatment, without allowable reason, may call upon the Equal Protection Clause for the vindication of its rights.

Women are no exception. Six years ago the District Court below, with Judges Rives and Johnson sitting there as in the instant case, explicitly guaranteed the rights of women as a group as worthy of protection under the Fourteenth Amendment. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).[12] In striking down Alabama's statutory exclusion of women from juries,[13] the *White* court noted that

---

[11] Cf. Graham v. Richardson, 403 U.S. 365 (1971).

[12] Approved by the Fifth Circuit Court of Appeals in Juelich v. U. S., 403 F. 2d 523 (1968) and Bass v. Mississippi, 381 F.2d 692 (1967).

[13] Cf. Hoyt v. Florida, 368 U.S. 49 (1961), discussed infra at page 29.

> [t]he plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens — including women. (251 F. Supp. 408.)

The *White* court has been joined by numerous tribunals in holding a sex classification invalid under the Equal Protection Clause.[14/] Foreshadowing this Court's own words, the decision in *Seidenburg v. McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (SDNY 1969), reflected the trend of lower court reasoning:

> Oft quoted principles that "sex is a valid basis for discrimination" or that the state may draw "a sharp line between the sexes"

14/ *See, eg.*, U. S. ex rel. *Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968), different sentencing for women; *Karczewski v. Baltimore and O.R.R. Co.*, 274 F. Supp. 169 (N.D. Ill. 1967) [*Compare Miskunas v. Union Carbide Corp.*, 399 F.2d 847 (7th Cir. 1968) (contra) with *Hitaffer v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950)] women's equal right to sue for loss of consortium; *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971), *amending* 416 F.2d 563, equal job opportunities; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (S. Ct. Calif. 1971), equal access to public accommodations.

> should not be applied mechanically without regard to the reasonableness of the relationship between the purpose of the discrimination and the sex-based classification . . .
>
> Men and women, if actually *situated similarly* for the purpose in question . . . must be treated alike. Only that action which an informed, intelligent, just-minded, civilized man or woman would rationally favor may be considered reasonable. [308 F. Supp. 1260, Emphasis added.]

Finally, this Court, which had long scutinized sex classifications in light of the Equal Protection Clause, twice last term found state statutes wanting. In *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971), an Idaho statute which commanded inferior treatment for women in the appointment of administrators of estates was struck down because it provided "dissimilar treatment for men and women who are thus similarly situated," 92 S. Ct. 254. And in *Stanley*

v. Illinois, 405 U.S. 438, 92 S. Ct. 1208 (1972), this Court invalidated an Illinois statute which had followed the sex stereotype that fathers want nothing to do with their illegitimate children.

III.

CONCEPTS OF EQUAL PROTECTION FOUND IN THE FOURTEENTH AMENDMENT ARE APPLICABLE BY IMPLICATION TO THE FEDERAL GOVERNMENT THROUGH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

It is far too late a day in our Constitutional development to respect the notion that "the Fifth Amendment contains no equal protection clause."[15] In the last twenty-five years that notion has been eroded and, finally, abandoned. *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948), began the process by extending the rationale of *Shelly v. Kraemer*[16] to federal action on grounds of "public policy." Any

---

[15] *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941), a case to be read, we suggest, more as deferring to Congress' tax power than defining the scope of the Fifth Amendment.

[16] 334. U.S. 1 (1948).

remaining doubt was rather convincingly laid to rest in *Bolling v. Sharpe*, 347 U.S. 497 (1954), in which the Court unanimously held that *Brown v. Board* applied to the schools of the District of Columbia as well as to those of the states, despite the fact that District schools were controlled by the federal government and not subject to the Fourteenth Amendment. "It would be unthinkable," replied the Court with incredulity for the District's argument, *Id.*, at 500, "that the same Constitution would impose a lesser duty on the Federal Government" than on the states. Although Equal Protection and Due Process are not strictly equateable, The Court reasoned, in that the former is more explicit, nevertheless "discrimination may be so unjustifiable as to violative of due process, " *Id.*, at 499.17/

17/ Certainly our national desire to end employment discrimination applies with equal vigor at both state and federal levels of government. *See* the recent Equal Employment Opportunity Act of 1972. Public Law 92-261, Sec. 717, 92nd Congress (March 24, 1972), 40 U.S.L.W. 51, 54 (1972). Since sex discrimination is no less onerous when undertaken by the federal government, there is no reason in this circumstance to treat state and federal impingements differently. Cf. *Johnson v. Louisiana*, 92 S. Ct. 1620, 1640 (Mr. Justice Powell, concurring).

This Court has continued to regard equal protection as inherent in the Fifth Amendment's Due Process Clause. *See, eg., Schneider v. Rusk*, 377 U.S. 163, 168 (1964) and *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), which illustrate that the judicial analysis under implied equal protection in the Fifth Amendment is identical to that employed under the Fourteenth Amendment. *See also*, Brief for the Appellee (United States), page 28, in *Welsh v. United States*, 398 U.S. 333 (1970).[18/]

IV.

THE CHALLENGED STATUTES DISCRIMINATE SOLELY ON THE BASIS OF SEX

Plaintiffs challenge the categorizations according to sex made in 10 U.S.C. 1072, 1076 and 37 U.S.C.

18/ The Circuits have consistently held to the view that the Equal Protection Clause applies to the federal government "by implication" through the Fifth Amendment's Due Process Clause. *See, Smith v. United States*, 424 F.2d 267 (9th Cir. 1970), *United States v. Norton*, 423 F.2d 474 (4th Cir. 1970), *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D. C. Cir. 1969), *Johnson v. Powell*, 414 F.2d 1060 (5th Cir. 1969).

401, 403. The cited provisions of Title 10 create
Air Force personnel an entitlement to certain medic
services for their dependents, while the cited provi-
sions of Title 37 create a similar entitlement to a
basic allowance for quarters (BAQ) as a supplement t
salary.

Under the medical program set up by 10 U.S.C. 107
1076, and the statutory BAQ system set up by 37 U.S.
401, 403, a male is entitled to greater benefits, in
form of medical care for his wife and higher housing
stipend solely by virtue of his *unrestricted* right t
claim his spouse as a dependent. In both situations
the statutes severly limit a female's entitlement to
benefits equal to those received by males by providi
a different and more restricted definition for who i
female's dependent. While the spouses of male Air
Force members are deemed "dependents" regardless of t
actual dependency, spouses of female Air Force membe
are considered "dependent" only if the husband is in
fact over one-half dependent upon his wife for his
support.

The result of this classification is a two-fold

1) Procedure — women are forced to the burden and vagaries of proving their spouses' dependency while male military personnel need offer no proof; indeed, the presumption for men is *non-rebuttable;*

2) Substance — since the presumption in favor of males is non-rebuttable, males whose wives are not financially dependent — and the numbers are by no means few[19] — are granted additional benefits while women in precisely the same circumstance are denied benefits.

The essence of Lt. Frontiero's challenge is that Sections 1072 and 401, in drawing a distinction between men and women similarly circumstanced and specifying burdensome treatment and diminished benfits for women, make an arbitrary and invidiously discriminatory classification in violation of women's rights to have the "protection of equal laws," *Yick Wo v. Hopkins, supra,* at 369. *Reed v. Reed, supra,*

---

[19] See *infra,* p. 51 .

92 S. Ct. at 253.

V.

STANDARDS OF REVIEW: THIS CLASSIFICATION DEMANDS STRICT SCRUTINY

Although in *Reed v. Reed, supra*, the more usual rational basis test was employed to strike down a discriminatory sex classification, that standard was apparently applied because the Idaho statute in question failed even to meet the strictures of such "loose review." *See, Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 1035 N. 7 (1972). Lt. Frontiero likewise submits that the federal government's discriminatory grant of fringe benefits has no rational basis and fails to meet the reasonableness test. However, the plaintiffs submit as well that this is a case peculiarly appropriate for strict review.[20/]

[20/] Cf. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), where the challenged statute was reviewed under the "compelling state interest" standard, even though it was admitted that the justifications advanced by defendants failed to meet the arbitrariness standard.

A.

It must be patently obvious that the statutes at issue here do not comprise protective legislation, for they neither protect against possible physical abuses to physiologically weaker women, *Muller v. Oregon*, 208 U.S. 412 (1908), *Goesart v. Cleary*, 335 U.S. 464 (1948),[21] nor protect against obstruction of home-making duties, *Hoyt v. Florida*, 368 U.S. 49 (1961).[22] Neither is this legislation designed to

---

[21] Lt. Frontiero by no means suggests that protective legislation is excusable. The Senate Judiciary Committee recently noted, S. Rep. No. 92-689, 92nd Cong., 2d Sess. 20, 1972, that "it is under the guise of protection that much of the sex discrimination in this country has been perpetrated." Rather plaintiffs suggest that what standard of review to apply to such situations, so different from the situaction *sub judice*, is a question which need not be reached in the present case. For fuller discussion of the importance of the early decisions upholding protective legislation, *see* Appellant's Brief in *Reed v. Reed*, *supra*.

[22] Lt. Frontiero is by her very military status no ordinary housewife — or so the armed forces contend. *See, Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *cert. granted* 41 U.S.L.W. 3220 (10-24-72).

rectify discrimination and to restore equality to women who have had fewer employment opportunities in the past. *Gruenwald v. Gardner*, 390 F.2d 591, 592 (2nd Cir. 1968), *cert. den.* 393 U.S. 982. Cf. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), involving true remedial legislation to rectify discrimination. Rather the legislation challenged here seizes upon a group, women, who have historically suffered employment discrimination[23] and diminished opportunities for employment,[24] and uses that inferior economic status as a justification for heaping on further discrimination[25] — reduced housing and medical benefits which men in the same circumstance

---

[23] See T. Murphy, *Female Wage Discrimination*, 39 U. CIN. L. REV. 615 (1970).

[24] Gruenwald v. Gardner, 390 F.2d at 592.

[25] The defendants' brief below, after noting that women had fewer jobs than men and generally less income, cited that inferior status as a rational basis for assuming females to be dependent on their husbands. Defendants' Memorandum, page 10.

automatically receive. Cf. *United States v. Gaston County, North Carolina*, 395 U.S. 285, 296-97 (1969), holding that in a situation where blacks have been denied equal educational opportunities, a county may not make educational attainments a prerequisite to voting.

The instant statutory classification, in that it uses inequality as a basis for imposing further inequality and has defined those to be burdened in terms of an entire biological group, 26/ has made "as invidious discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The plaintiffs' argument does not require that

26/ Indeed, one court has suggested that it is for this very reason of all-inclusiveness that sex classifications should *always* be considered suspect:

> . . . The characteristic of sex frequently bears no relation to ability to perform or contribute to society . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members . . . [*Sail'er Inn, v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971)]

every classification by sex be held "suspect," thereby forbidding any legislative distinction between men and women.[27] True protective, remedial or even neutral (*eg.*, separate restrooms) statutes could be judged by the rational basis test, as in *Gruenwald v. Gardner*, 390 F.2d at 592. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). However, statutes like the ones at bar, which impose further inequities in a subject matter area, employment, where remedial rather than oppressive measures are concededly needed,[28] must surely carry a much heavier burden of justification.[29]

---

[27] Cf. *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 855056 (1972), where strict review, although not applicable to the topic generally was held to apply in certain egregious circumstances.

[28] P. Freund, *The Equal Rights Amendment Is Not The Way*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 234 (197

[29] The distinction between burdensome and protective legislation has been twice noted by district courts, once affirmed by this Court. *Kirstéin v. Rector & Visitors of University of Virginia*, 309 F. Supp. 184, 187 (D.Va. 1970) (strict review of burdensome classification), *Williams v. McNair*, 316 F. Supp. 134, 138 (D.S.C. 1970) (three judges) (Haynesworth, CJ., applying rational basis test to neutral classification *aff'd.* 401 U.S. 95 (1971).

For this reason, Lt. Frontiero submits that the instant sex classification should be treated as suspect and upheld only if shown to be "necessary and not merely rationally related" to the accomplishment of a permissible governmental purpose. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

B.

Despite our position that the instant burdensome classification by sex is suspect, and therefore subject to strict scrutiny, the plaintiffs submit that the challenged statutes fail even to meet the traditional reasonableness test. Although sometimes referred to as "loose review," this standard still demands much from the legislator. As Mr. Justice Brandeis stated in *Quaker City Cab Co., v. Commonwealth of Pennsylvania*, 277 U.S. 389, 406 (dissenting opinion),

> [w]e call that action reasonable which an informed intelligent, just-minded civilized man could rationally favor. In passing upon leg-

> isiation. . . we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that *all actually situated similarly will be treated alike*. . . .[Emphasis Added]

Compare *Reed v. Reed*, supra, 92 S. Ct. 251, where the Court last term stated the reasonableness test in a similar manner.

While the Court has sometimes stated under the rational basis test that a government may eradicate some "evils of the same genus" without erradicating all, *REA v. New York*, 336 U.S. 106, 110 (1949), or that it may regulate one portion of a problem without dealing with the entire problem, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), those observations have no relevance here. In each of those cases the Court pointed to some substantial difference in circumstances, 336 U.S. at 110, 348 U.S. at 489, which would have justified the differing treatment. Furthermore, the legislative history of the benefit

system here challenged shows beyond doubt that Congress intended to solve the evil of low pay for both men and women.30/ Congress simply went about that task in an arbitrary and unreasonable manner when it enacted different definitions of dependency for men and women.

C.

This Court has increasingly realized that choosing which test to apply is no substitute for the difficult job of actually judging the substantiality of relevant interests and the degree to which they are restricted or advanced by the contested legislation. *See, Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 1405 (1972).31/ Cf. *Bullock v. Carter,*

30/ *See,* pages 40-45, *infra.*

31/ Surely women as a group are no less able to change their sex status than illegitimate children are to change their inferior status. Each incurs liabilities on the basis of a condition which is both unchangeable and unrelated to individual capacities.

405 U.S. 134, (1972). *Carrington v. Rash*, 380 U.S. 89, (1965). The plaintiffs implicitly recognized this situation when, in arguing for strict scrutiny, *supra* at page 29 , we contended that a sex classification needn't always be suspect.

The plaintiffs submit that at the very least no permissible state interest may be furthered by a classification which seizes upon the previously disadvantaged in order to define a class subject to additional unequal treatment. Cf. *United States v. Gaston County*, 395 U.S. 285, 296-97 (1969). Furthermore, the government's interest in this administrative procedure, its justification for this inequality, is nothing but mere administrative ease. Since that interest may be furthered by more precise and less drastic means, Lt. Frontiero suggests that it is insufficient to justify the discrimination against her as a woman. (See pp. 52-53 infra.)

In short the government's interest in ease of administration cannot by any test justify the further visitation of inequalities upon women which the pre-

sent dependency definitions enact. Such discrimination runs counter to our basic concepts of fairness and equality inherent in due process.

VI.

THE GOVERNMENT'S JUSTIFICATIONS FOR THE DISCRIMINATION HAVE NO RATIONAL BASIS AND ARE INSUBSTANTIAL

The governmental defendants sought to establish the reasonableness of the challenged sex classification, its rational relation to the objective of the statute, by proposing two purposes for the statutes as justifications for the discrimination:

A) the need of the armed forces to attract more men than women — hence the propriety of offering greater benefits to men;[32/]

B) the desire to lighten the administrative workload — based on the rationale that because, it is contended, men earn more than women, men's spouses may be presumed to be

---

32/ Defendants' Memorandum at 7.

dependent.[33]

The plaintiffs submit that both of these justifications fail.

Purpose (a)

The Need to Attract More Men

The defendants claimed below that the

> provision of additional benefits to male members of the Air Force [is justified] in view of the structure of our Armed Forces to rely heavily on men, a structure necessitated by physical differences between men and women.[34]

The Government prevailed with that argument in *United States v. Cook*, 311 F. Supp. 618 (W.D. Pa., 1970), regarding the necessity of conscripting males only, and having found it to work there, we suggest, the Government raises it again here.

The plaintiffs will rebut this rationale for the

---

[33] *Id.* at 9.

[34] Defendants' Memorandum in Support of Motion at 5; repeated in Defendants Memorandum at 7.

statutes by showing that it is wholly contrived and is diametrically opposed to the real purpose of the statutes as stated in Congressional debate. Moreover, even assuming that this were the real basis for Congress' distinction between men and women, the different dependency definitions do not reasonably relate even to this hypothetical purpose of the statutes. The affect of this classification upon attaining a desired ratio of men to women in the armed services is truly negligible, remote, and speculative.

While it is true that a discriminatory classification may be sustained under the rational basis test "if any state of facts reasonably may be conceived to justify it," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), the conceived justifications may be rebutted by showing that they were never intended by the legislature or by showing affirmatively that the legislature had a contrary intent incompatible with that hypothesized. *See, eg., Eisenstadt v. Baird*, 405 U.S. 645, 92 S. Ct. 1029, 1036-38 (1972),

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S. Ct. at 1405-06 (1972). The legislative history of the housing allowance bill and of the medical benefits bill conclusively show that far from intending to attract a disproportionate number of men in the armed services, these statutes were aimed at attracting both men and women and as many of each as possible.

The statutes at issue here, although enacted seven years apart, have effectively identical dependency provisions. 10 U.S.C. 1072, 1076, dealing with medical benefits, goes back to H.R. 9429 (1956), while 33 U.S.C. 401, 403, concerning living allowances, is derived from H.R. 5007 (1949). It will not be necessary to consider each bill separately, however, for it is clear from Congressional debate that each was intended to remedy the same evil. Both bills were sponsored and reported out of the same committee by the same Congressman, Mr. Kilday of Texas, who ascribed the same purpose to both bills.35/

In both 1949 and 1956 the Armed Forces faced the

35/ See Notes 37 and 40, *infra*.

very critical problem of retaining skilled personnel in the services in the face of the higher wages and extra benefits offered by private industry. It was this critical need to keep trained workers that provided the motivation and purpose for both statutes.[36] Congressman Kilday noted in support of the medical benefits bill that its purpose was to put the Armed Forces "on a competitive basis with business and industry" in the area of fringe benefits,[37] so as to attract "career personnel" through re-enlistment.[38]

The purpose of the bill was *not* to attract more men than women by a disproportionate grant of fringe benefits. Senator Saltonstall, ranking minority committee member speaking in bi-partisan support of the medical bill, made clear that both men and women — since both possessed needed skills and training — were to be enticed into re-enlisting:

---

[36] Congressional *Record*, 84th Cong., 2d Sess. Vol. 102, 3847 at 3849-50 (remarks of Mr. Kilday).

[37] *Id.* at 3850, col. 2.

[38] *Id.*

> This single bill is not in itself an answer to all our manpower problems, of course. It does, however, to my mind, represent a long step forward toward the attainment of our objective, namely, the completely adequate defense of the United States not alone in terms of weapons and material but, more important, in terms of the men and women ready, willing, and able to devote themselves without interruption of career to the building up of the Nation's security.39/

The same considerations carried the day when Congress considered the allowances bill (BAQ being one of the allowances). Mr. Kilday spoke of Congress' fear of losing trained personnel if adequate benefits were not paid.40/ Others spoke on the same need for

---

39/ Congressional *Record*, 84th Cong. 2nd Sess., Vol. 102, 8042 at 8043, col. 1. [Emphasis Added].

40/ Congressional *Record*, 81st Cong. 1st Sess., Vol. 95, 7656 at 7662. *See also* the letter of General Eisenhower, *Id.*, at 7662-63.

retaining those whom the Army had already trained,[41] and Congressman Price gave the reason such trained people were needed:

> The United States armed services today are highly technical organizations geared to split-second timing and complex machinery. Each depends for efficient operations upon specially trained *men and women*.[42]

In short, Congress recognized a need to provide greater fringe benefits to Armed Forces members so as to attract trained career personnel — men and women alike. In the face of such a *stated* need for both men and women with skills, it is demonstrably unreasonable to conceive that Congress wanted to attract back more men than women. Statements of the Congressmen and Senators reveal a clear hope that both women and men would be enticed to rejoin — and as many of each as possible.

---

[41] *Id.*, at 7664 (Mr. Short), 7666 (Mr. Havenner). 7667 (Mr. Bates), 7671 (Mr. Johnson).

[42] *Id.*, at 7671. [Emphasis Added].

Two further factors should be noted. First, with regard to the medical benefits bill, it was specifically stated in Congressional debate that another reason for its passage, in addition to providing career incentives, was to equalize the medical benefits offered to members of the various services.[43] To suggest that Congress intentionally chose women for unequal benefits ascribes a mean and unworthy motive to Congress. Second, and more to the point, when Congress has decided that a disproportionate number of women is necessary for one branch of the services, it has accomplished that purpose with statutory ease. See, *eg.*, 10 U.S.C. 8215, limiting to 2% the number of women enlistees and officers in the regular Air Force. Cf. AIR FORCE MANUAL 36-5 Department of Air Force, Sections 2-2n, 2-13(d)(2), 3-1(a)(19) (September 30, 1970).

---

[43] Congressional *Record*, Vol. 102, *supra* at 3848-49 (remarks of Mr. Kilday in colloquy with Messrs. Arends, Boland and Gross), and 3851, col. 2 (Mr. Kilday).

In summary, nothing in the Congressional debates lends any credence to defendants' contention that these statutes were purposely drawn so as to procure more men for the Armed Forces than women. Indeed, the explicitness with which Congress has legislated when it truly desired to limit the number of women and the clarity of the legislative history in showing that Congress with these benefits intended to attract back both men and women affirmatively demonstrate that this suggested purpose of these statutes is wholly fabricated.

Yet even if one assumes that Congress intended to grant disproportionate benefits in order to attract more men, the discrimination practiced by the statute bears not rational relation to this hypothetical purpose. Like the administrative benefits in *Carrington v. Rash*, 380 U.S. 89 (1965), the goal of attracting more males and fewer females is in this context too remote and speculative to justify the discrimination. Its affect, if any, is "negligible," and therefore has no rational relation to the hypo-

thetical purpose. *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 406 (1928) (Brandeis, J., dissenting).

Plaintiffs submit that the very idea of diminishing the re-enlistment of women relative to men by providing fewer medical and housing benefits to the families of women is not only speculative, it is barbaric. With the Armed Forces currently spending millions of dollars in advertising its benefits to women, it is the ultimate *non sequitur* for defendants to say that these challenged statutes, with their technical and involved definitions, would have any appreciable affect in lowering the enlistment rate of women. Indeed, the only affect of the statute is to discriminate against women who are already members of the Armed Forces. 44/

44/ The argument that these discriminatory dependency provisions rationally relate to the statutory purpose because the statutes' very purpose was to discriminate seems almost a curiosity — or an admission of improper purpose. The argument that discrimination was not inequality because it applied uniformly against the victim class has not been a new issue in this Court since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and it was rejected there. *See also, Carrington v. Rash*, 380 U.S. 89, 93 (1965).

Purpose (b)

Lightening the Administrative Burden
by Presuming Males' Spouses Dependent

The defendants in their brief below[45/] characterized the dependency definitions at issue here as enacting a statutory presumption that males' spouses were dependent, while refusing to allow the presumption for females. They argue that this presumption, made admittedly only to lighten the administrative workload of bearing both men and women, is justified because women earn less than men.

The defendants treated as self-evident the proposition that difference in income levels somehow determines which family member is dependent. Lt. Frontiero contends (1) that there is no rational relationship between income levels and dependency, and (2) that, even if there is a relation, armed force statistical studies clearly show that military males earn less than civilian females (their spouses).

45/ Defendants' Memorandum at 9.

Furthermore, the plaintiffs insist (3) that since the presumption serves no other purpose than to lighten administrative workloads, by forcing only women to a hearing, it is insufficient to justify the discrimination which it occasions.

The defendants argued below that since men in the general population earn more than women in the general population , the armed forces administrato may assume that spouses of military men are"depende on their husbands and that the spouses of military women are not "dependent." The plaintiffs contend that such income figures alone have no rational relationship to determining dependency. This is because whether a person is "one-half dependent" 46/ on his spouses' income varies not just with income but also with total expenses.

The Frontiero's illustrate this point perfectly. Joseph's income (at $205.00 per month) is less than one-half of Sharron's base income of $443.70 per

---

46/ This is the language of each statute. Appendix page 23a-29a.

month.[47] By the defendants' reasoning Joseph, with an income lower by half, should be the "dependent" of Sharron. But this is false, for Joseph's expenses are only $354.00 per month and his $205.00 income pays over one-half of that total. Thus, since dependency varies not only with income but also with expenses, there is absolutely no rational connection between income levels and "one-half dependency." Any presumption based on such figures is *ipso facto* unreasonable.[48]

What happens, however, if one takes the view that

---

[47] Appendix at 49-50.(Stipulation of Facts).

[48] By analogy, could it be shown that the ability to pass a bar exam was greater among children from high income parents, would it be reasonable to pass them automatically and subject only poor students to the exam? Very likely not, for we know that ability to pass the bar, although it may be higher among students from high income families due to better educational opportunities, also depends upon native intelligence and what even poor students have learned with lesser educational opportunities. Thus to judge on the basis of one criterion, when many are involved, would be unreasonable. The same is true in the case *sub judice*.

the income figures and the statutory presumption based on them are at least sufficient to serve as a "rough accommodation"[49] to solve the problems of government? Of course the true answer to that view is that even rough accommodations are included under the reasonableness test and must have a rational basis[50] — and we have shown that the income statistics have no rational relation to predicting dependency. However, let us assume for the defendants' sake that income figures are relevant in predicting dependency, i.e., that the lower income may be taken as a rough indication of dependency. What do we find?

Now, the defendants submitted below that we should compare the income of men and women in the general population,[51] but it is well known that males in the armed forces draw a much lower salary than males

---

[49] Dandridge v. Williams, 397 U.S. 471, 485 (1970)

[50] Id.

[51] Defendants' Memorandum at 10.

population generally.[52/] Therefore, in exploring the dependency of males' wives, one must compare *males in the military* with *women in the general population* (that is, the military males' wives).

These figures for military males, compiled by the Executive Department itself in a report to guide our governmental policies toward our military men and women, show the following:

Median Income of Male in Armed Forces $3686[53/]

Median Income of Female in General Population $5323[54/]

Since the average military male earns less than civilian females, by the defendants' own logic — "the lower income indicates dependency" — most

---

52/ The Report of the President's Commission on an All Volunteer Armed Force (1970) *passim*. *See also*, pages 40-41 *supra*.

53/ The Report of the President's Commission on an All Volunteer Armed Force, Table 5-I at p. 51, Table A-II at p. 181 (1970). See Addendum.

54/ U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Fact Sheet on the Earnings Gap 1 (December 1, 1971) (median for 1970).

armed forces males could not prove their wives' dependency. The armed forces' argument that they may reasonably presume males' spouses dependent is completely exploded.

There is, therefore, simply no rational connection between income levels and the armed forces' statutory presumption that males can prove their spouses' dependency. The armed forces' own statistics indicate no reasonable basis for a presumption for males; indeed, such figures rebut that very presumption.

At another level, this defense argument points up the extent of the discrimination Lt. Frontiero faces. If the Government really believes that lower income alone can accurately predict dependency, why not make that criterion the basis for easing the administrative burden? Why ascribe that condition to a second group, women? At the very least when burdens are distributed upon women, forcing them to receive fewer benefits (when men in the same circumstance receive benefits by virtue of an irrebuttable pre-

exception), the statutory classification should be drawn as narrowly as possible. Cf. *see, Dean Milk Co. v. City of Madison* 340 U.S. 349, 354 (1951) (discrimination in the economic context), *Shneider v. State*, 308 U.S. 147, 162 (1939), Cf. *Levy v. Louisiana*, 391 U.S. 73 (1968), *King v. Smith*, 392 U.S. 309 (1968). And since the Government, by its own rationale, can accomplish its purpose of lightening the administrative workload by narrowly presuming dependent all spouses with income lower than that of the military member, the present classification by sex is grossly overinclusive and unreasonable.

Yet, even aside from the fact that these sex classifications have no rational basis, they suffer a more basic problem. The classification serves no other purpose than to lighten the administrative workload. It is easier work, the Government contends, if it can grant benefits to males automatically and force only women to the burden of proving their spouses' dependency. Indeed, the District Court upheld the sex discrimination on the basis that a

classification

> made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams v. City of Milwaukee*, 228 U.S. 572 (1913).55/

It would perhaps be the ultimate irony of this sex classification that it should be upheld with citation to a sixty-year-old case involving the regulation of cows and milk. That was the situation in the Adams case, *supra*. However, aside from the irony of milk and cows controlling women's rights, the *Adams* case on purely legal grounds has no place in deciding the instant controversey.

The statute and classification in *Adams* reasonably accomplished the great governmental con-

---

55/ Appendix at p. 11a , reported in 341 F. Supp. at 207 . After a conclusory finding of no administrative burden, the court below never considered the substantive inequality the dependency provisions created, Cf. p. 37 *supra* of this brief.

cern of ensuring a pure and unadulterated food supply for the citizenry. 225 U.S. at 583-83. The difference in classification and treatment was justified as necessary to vindicate this substantive concern. *Id.* at 581. By contrast the statutory classification challenged here serves no purpose other than to lighten an administrative workload. Such an interest has repeatedly been held insufficient to justify the resulting discrimination, regardless of the standard of review applied. *See, eg.*, *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (no standard of review specified) where administrative benefits were held to be too "remote" to justify the discrimination. Cf. *Shapiro v. Thompson*, 394 U.S. 618, at 633-38 (1969).56/ And, of course, in *Reed v. Reed*, *supra*, just last term, it was the "administrative convenience" argument which was rejected by

---

56/ *Dandridge v. Williams*, 397 U.S. 471 (1969), by contrast, was not a case involving administrative convenience. There, as in *Adams v. Milwaukee*, *supra*, the state was advancing a substantive state policy, the welfare goal of keeping marginally employed families from earning less than welfare recipients received.

this Court in a unanimous opinion after analysis under the rational basis test.

Indeed, the dependency rules challenged here are almost indistinguishable from the mandatory preference rule struck down in *Reed* — under the guise of procedural convenience, they foster substantive inequality. Since the presumption in favor of males is automatic and non-rebuttable, males whose wives are not financially dependent — and the armed forces' statistics show that the numbers are by no means few[57] — are granted benefits while women in precisely the same circumstance are denied benefits. While lightening the administrative burden, the different dependency rules fail to heed the command of *Reed v. Reed* that all similarly circumstanced shall be treated alike.

VII.

THE ISSUES AT BAR ARE DISCREET AND SUSCEPTIBLE TO JUDICIAL RESOLUTION

57/ See page 51 *supra*. Fully half of the armed forces males (those below the median) have incomes below the average for civilian females — the class in which their wives would fall.

Several commentators have suggested wide-ranging inequities in the common law rules relating to family relationships and dependency. *See, eg.*, M. Hughes, *And Then There Were Two*, 23 Hast. L. J. 233 (1971). Those rules must stand and fall on their own merits,[58] however, for the Government admits, and Lt. Frontiero agrees, that the statutes at bar do not draw from or incorporate common law. As the Government stated below, "Congress has provided the benefits at issue solely to members of our Armed Forces. This entails consideration of factors entirely different from those which might be reflected in adoption of a general common law rule. . . ."[59]

That the legislation at bar does not rely upon the common law is apparent from a brief review of the

---

[58] *See, eg.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.* 405 U.S. 970 (1972).

[59] Defendants' Supplemental Memorandum at 2. See also note 22 *supra* relating to the Armed Forces' peculiar demand upon women.

the duties that system imposed upon husband and wife.[60] The husband at common law was duty bound to support his wife, yet, while the wife owed her husband no explicit reciprocal duty to "support" him, she was duty-bound to render him services and to turn over to him all her earnings. See 41 CJS 413, "Husband and Wife," Section 17, and the cases there noted. The common law view of marriage envisioned man and wife as a single entity. That entity was sustained by man's work and earnings and by his wife's work and earnings, 41 CJS 404-414. *U. S. v. Dege*, 364 U.S. 51 (1960).

Thus, in its totality, the common law decreed that both husband and wife were obligated to sustain each other: the wife duty-bound to render services and give her earnings to her husband and the husband

---

60/ The District Court in requesting briefs on this issue apparently worried over the notion that since the states' common law imposed a duty upon husband to support their wives, the armed forces might consider the wives dependents. This view of course ignores the reciprocal common law duty of a wife to give her earnings to support her husband. See text at this note and defendants' statement, supra, p. 57.

duty-bound to support his wife.[61] Accordingly, the plaintiffs conclude that the common law rules in fact established mutual duties of wife and husband to support each other, and that there resulted a mutual inter-dependence between husband and wife. From such common law relationships it is impossible to infer that only the wife is always her husband's dependent, as the statutes *sub judice* decreed.

While Lt. Frontiero agrees with the Government that the challenged statutes can only be read as an attempt to guess actual dependency, and do not incorporate the old common law rules, she does suggest that the true basis for this discriminatory legislation can be traced to a sex stereotype which predominated in the heyday of the common law — that stereotype was woman as the dependent homebound wife. *See, Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130

---

[61] Part of the problem here is the rhetoric of the common law which favored the male. The wife did not "support" her husband — she was instead duty-bound to give him her money and services and he then supported himself.

141-142(1873);*Nolin v. Pearson*, 191 Mass. 283, 284-285 (1906). See, *Equal Rights for Women: A Symposium*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 215 (1971) especially Comment, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality*, *Id.*, 260.

Whatever may be said for the merits of the notion that men should earn while women keep house, that idea simply does not conform to our present societal structure. To continue in light of changed circumstances to hold to the antiquated view that women are always controlled by and dependent on their husbands, this Court warned in *United States v. Dege*, 364 U.S. 51, 54 (1960) (per Frankfurter, J.),

> would require us to disregard the vast changes in the status of woman — the extension of her rights and correlative duties — whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.

Although the opinion in *Dege* was given in interpretation of a federal statute and not in reply to a constitutional challenge, *Id.* at 52, such an inordinate change in circumstances would surely leave the classification predicated upon those facts baseless.62/ And that was precisely Justice Frankfurter's point — that our national society and woman's role in its economic life have so changed as to leave no basis for any longer considering the wife controlled by, dependent upon, and merged with her husband in one legal entity. *Id.* at 54.63/

Labor Department statistics bear out Justice Frankfurter's perception that married women are no longer confined to household duties. Almost three-

---

62/ *See* Edwards v. California, 314 U.S. 160, 174 (1941), Papachriston v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 844 n.5., 846-47 (1972).

63/ Compare *Strauder v. West Virginia,* 100 U.S. 303, 310 (1880)(dictum), finding the common law exclusion of women from juries perfectly acceptable in that age, with *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three judges), striking down Alabama's statute which had adopted the common law exclusion of women.

fifths of all women workers are married and living with their husbands,64/ and in certain income ranges almost half the wives are holding down regular jobs.65/

Whatever may be said for local variations where the notion of the home-bound wife might carry some validity, 66/ in our *national* life and commerce in which Congress has here legislated, the antiquated facts that these dependency definitions reflect has long ago passed into history. *United States v. Dege*, supra at 54. That mold-covered doctrine and

---

64/ U. S. Department of Labor, Employment Standards Administration, Women's Bureau, Women Workers Today 4 (1971).

65/ *Id.*, *eg.*, in the income range in which husbands earn between $5,000 and $6,999, forty-six percent of their wives are in the labor force.

66/ *See, Hoyt v. Florida*, 368 U.S. 57, 62 (1961). It is interesting to note as indicative of woman's emancipation that Florida, which had seen a basis for treating women differently in 1961, amended its jury statute in 1967 to treat men and women substantially equally in the matter of exemptions. See Comment, *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RTS.-CIV. LIBS. L. REV. 260, 262 N. 18. Fla. Stat. Ann. Section 40.01 as amended Laws 1967, c. 67-154, Section 1.

lifestyle cannot provide a rational basis for today's sex classification. 67/

VIII.

RELIEF: BENEFITS SHOULD BE EXTENDED TO WOMEN ON THE SAME BASIS AS TO MEN

Contrary to the prevailing notion of an earlier era, it is no longer accepted that in granting a "privilege" a legislature may establish any sort of classification it fancies. *Speiser v. Randall*, 357 U.S. 513 (1958). *See also, Shapiro v. Thompson*, 394 U.S. 618, 627 N. 6 (1969), *Sherbert v. Verner*, 37 U.S. 398 (1963), Van Alstyne, *The Demise of the Right - Privilege Distinction in Constitutional Law*,

---

67/ Said Mr. Justice Holmes,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists out of imitation of the past. [Holmes, Collected Legal Papers, 187 (1920), reprinting *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).]

81 HARV. L. REV. 1439 (1968).

When the District Court characterized relief for Lt. Frontiero as a "windfall," Judge Johnson rightly called it a throwback to the days of right-privilege distinctions. 68/ And, of course, if granted equal benefits, Lt. Frontiero would be getting no more a "windfall" than all those males who automatically claim their spouses as dependents. 69/ In *Levy v. Louisiana*, 391 U.S. 68 (1968), the state granted to certain dependents benefits unknown at common law. Who would suggest that *Levy's* command to extend those benefits to uncovered illegitimate children constituted a "windfall" for those plaintiffs

Of course, the problem of whether to extend benefits to women does not fairly relate to the substantive issue of constitutionality, but rather bears upon the question of what relief this Court could or

---

68/ Appendix 21a(Johnson, C.J. dissenting) p. 21 reported in 341 F. Supp. at 211.

69/ The number who cannot prove their wives dependent is substantial. See pages 51 & 52 and note. 57, *supra*.

should order. Whenever a court finds an unconstitutional classification and unequal treatment, it must then decide whether to remedy the defect by declaring the statute equally operative upon all persons similarly situated or by declaring the statute inoperative as to all of them. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Plaintiffs suggest that the intent of Congress ought to guide the Court on this issue. In such a situation said Mr. Justice Harlan, *Welsh v. United States*, 398 U.S. 333, 355 (1970), the Court is "to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." In the present case we have found that Congress enacted this statute after perceiving a specific need for bestowing medical and housing benefits upon armed forces personnel and their families.[70] It would, therefore, frustrate the very

---

[70] See page 41 *supra*.

purpose of these statutes were the Court to render them wholly inoperative. *See, Levy v. Louisiana*, 391 U.S. 68 (1968), *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400 (1972), where benefits were extended to effectuate the statutory purpose. Cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), Court refused to extend sterilization punishment to all thieves.

Similarly, it would do no violence to Congress' intent to allow women to claim their husbands automatically as dependents. Congress has already followed that form with respect to men. In fact, considering the Government's stated desire for administrative convenience, it is extremely unlikely that Congress would impose the administrative interview burden upon its military men and administrative staff.[71/] In such a situation a constitutional de-

---

71/ Said Congressman Kilday, the sponser, regardi a similar aspect of these statutes, "We are not intere in setting up a lot of clerks to handle a lot of paper work like that." Congressional *Record*, 84th Cong. 2nd Sess., Vol. 102, 3849.

fact should be cured by judicial direction that the benefits be extended unless Congress shall manifest its intent otherwise.72/

CONCLUSION

For the reasons stated above Lt. Frontiero and her husband ask that the judgment of the District Court be REVERSED and that the discriminatory dependency provisions here challenged be declared unconstitutional. The plaintiffs further request that until Congress shall manifest its intent to the contrary the defendants be required to extend medical and housing benefits to women on the same basis as they are extended to men.

Respectfully submitted,

JOSEPH J. LEVIN, JR.
MORRIS S. DEES, JR.
125 Washington Avenue
Montgomery, Alabama

72/ *See*, Iowa-Des Moines National Bank v. Bennett 284 U.S. 239 (1939) (per Brandeis, J.).

ADDENDUM

Statistics on Median Income of Military Personnel

Source: The Report of the President's Commission on an All-Volunteer Armed Force - 1970

Table 5-I:

A. "First term personnel" who are enlisted men comprise fifty-nine per cent of total armed forces personnel ($\frac{1,974,000}{3,365,000}$ = 59%).

"First term personnel" are defined as those with less than four years' service. Thus, we observe that fifty-nine per cent of all armed forces personnel are enlisted men of less than four years' service.

Table A-11

B. Such personnel are shown to have a maximum earning capacity of $3,686.

C. Since 59% of all personnel earn at the $3,686 rate, it is reasonable to assume that 50% (the median) earn less than $3,686.

NOTE:

The real median is probably much less than even the $3,686 figure, since that figure is the 59%-ile earning level; the 50%-ile level, that is, the median, must be even lower.

FILE COPY

DEC 8 1972

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
MARC FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

INDEX

	PAGE
Interest of *Amicus*	1
Opinion Below	2
Jurisdiction	2
Statutes and Regulations Involved	3
Question Presented	3
Statement of the Case	3
Summary of Argument	6
ARGUMENT	
Introduction	9
I. Historical Perspective	11
II. The statutes at issue discriminate against female members of the uniformed services and constitute a denial of equal protection of the laws, guaranteed by the due process clause of the fifth amendment	20
A. The fifth amendment due process clause encompasses guarantees of security from arbitrary treatment and of equal protection of the laws; appellants' case rests upon these fundamental guarantees	20
B. The classification at issue in this case is based solely on sex	21
C. Equal protection standards of review	22

PAGE

D. Rather than assigning a "heavy burden" to appellants and applying a "lenient" standard of review, the court below should have subjected 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 to close scrutiny, identifying sex as a "suspect" criterion for legislative distinctions .. 24

1. The challenged classification rests upon a view of the married woman which does not accord with present day reality 24

2. Enlightened courts have begun to strike down discriminatory sex-based classifications as inconsistent with the equal protection guarantees of the United States Constitution; but there is substantial confusion as to the standard of review appropriate to these challenges 27

3. Precedent in need of revaluation: "benign" classifications that provide a "place" for woman in man's world 34

III. The challenged classification is not justified by administrative convenience, the primary rationale relied on by the majority below 44

A. The challenged classification does not result in substantial economies 44

B. Dissimilar treatment for men and women who are similarly situated cannot be justified by characterizing the benefits here at issue as a "privilege" or a "windfall" 47

C. This Court and lower federal courts have rejected administrative convenience as a

PAGE

justification for discriminatory sex-based classifications 48

D. Congressional equalization of benefits paid to or for the "dependents" of male and female employees of the federal government demonstrates the administrative feasibility of equal treatment and congressional concern that sex-based discrimination be ended 50

E. Federal prohibitions of discrimination on the basis of sex by private and state employers forbid practices of the kind authorized by the statutes at issue in the case at bar 54

F. Summary and conclusion: The discrimination against women mandated by the challenged classification is neither (a) supported by a compelling state interest; (b) necessary to the accomplishment of legitimate legislative objectives; nor (c) reasonably related to a permissible legislative objective 57

IV. Upon determining that 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 as now limited violate the fifth amendment, the Court should, consistent with the dominant statutory purpose, remedy the defect by extending to female members of the armed forces the same benefits now available to similarly situated male members 62

Conclusion 70

PAGE

Table of Authorities

Cases:

Abbott v. Mines, 411 F.2d 353 (6th Cir. 1969) 43
Alexander v. Louisiana, 405 U.S. 625 (1971) 42

Bartmess v. Drewerys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971) 55
Bennett v. Dyer's Chop House, —— F. Supp. ——, 41 U.S. Law Week 2243 (N.D. Ohio Oct. 26, 1972) 30, 41
Bolling v. Sharpe, 347 U.S. 497 (1954) 20
Bosley v. McLaughlin, 236 U.S. 385 (1915) 38
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 35, 36
Bravo v. Board of Education, 345 F. Supp. 155 (N.D. Ill. 1972) 32
Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) 32
Brenden v. Independent School District, 342 F. Supp. 1224 (D. Minn. 1972) 33
Buchas v. Illinois High School Ass'n, 41 U.S.L.W. 2277 (N.D. Ill., Nov. 15, 1972) 34
Bullock v. Carter, 405 U.S. 134 (1972) 23, 60
Bunting v. Oregon, 243 U.S. 426 (1917) 38
Burrow v. Kapfhammer, 284 Ky. 753, 145 S.W.2d 1067 (1940) 68

Cohen v. Chesterfield County School Board, —— F.2d ——, 41 U.S.L.W. 2167 (4th Cir. Sept. 14, 1972) 32
Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) 31

Dandridge v. Williams, 397 U.S. 471 (1970) 40
Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972) 21, 67

PAGE

De Kosenko v. Brandt, 63 Misc. 2d 895, 313 N.Y.S.2d 827 (Sup. Ct. 1970) 42
Dunn v. Blumstein, 405 U.S. 330 (1972) 23, 58, 59

Eisenstadt v. Baird, 405 U.S. 438 (1972) 32
Ealinger v. Thomas, 324 F. Supp. 1329 (D.S.C. 1971) .. 33

Forbush v. Wallace, 341 F. Supp. 317 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972) 49

Gates v. Foley, 247 So. 2d 40 (Fla. 1971) 31, 68
Glona v. American Guaranty & Liability Ins. Co., 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968) 67
Goesaert v. Cleary, 74 F. Supp. 735 (E.D. Mich. 1947), 335 U.S. 464 (1948) 36, 39, 40
Goldblatt v. Board of Education, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) 42
Graham v. Richardson, 403 U.S. 365 (1971) 23, 28
Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972) .. 67
Gulf, Colorado & S. F. Ry. v. Ellis, 165 U.S. 150 (1897) 60
Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972) 33

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 23, 28
Hawley v. Walker, 232 U.S. 718 (1914) 38
Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972) 68
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 3
Heath v. Westerville Board of Education, 345 F. Supp. 501 (S.D. Ohio 1972) 32
Hernandez v. Texas, 347 U.S. 475 (1954) 28

PAGE

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 21
Hoyt v. Florida, 368 U.S. 57 (1961) 41, 43, 49

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931) 68

Katzenbach v. McClung, 379 U.S. 294 (1964) 3
Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) 30
Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971) 39
Konigsberg v. State Bar, 353 U.S. 252 (1957) 35

La Fleur v. Cleveland Board of Education, 326 F. Supp. 1208 (N.D. Ohio, 1971), *reversed*, 465 F.2d 1184 (6th Cir. 1972) 32, 34
Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) 32
Legatos, In re Estate of, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) 31
Leighton v. Goodman, 311 F. Supp. 1181 (S.D.N.Y. 1970) 41
Levy v. Louisiana, 391 U.S. 68 (1968), *rehearing denied*, 393 U.S. 898 (1968) 67
Lochner v. New York, 198 U.S. 45 (1905) 37, 38, 39
Lockwood, In re, 154 U.S. 116 (1894) 35

McLaughlin v. Florida, 379 U.S. 184 (1964) 23
Mengelkoch v. Industrial Welfare Commission, 442 F. 2d 1119 (9th Cir. 1971) 30, 38
Miller v. Laird, Civil Action No. 752-71 (D.D.C. Aug. 31, 1972) 21, 50, 60, 69
Miller v. Wilson, 236 U.S. 373 (1915) 38
Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) 7

PAGE

Mollere v. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969) 30-31
Moritz v. Commissioner of Internal Revenue, No. 71-1127, —— F.2d —— (10th Cir. Nov. 22, 1972) 21, 32, 47, 62, 67, 69
Morris v. Richardson, 346 F. Supp. 494 (N.D. Ga. 1972) 21, 67
Muller v. Oregon, 208 U.S. 412 (1908) 37, 38, 39

Paterson Tavern & Grill Owners Association v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970) 31, 41
Patricia A., Matter of, 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972) 33
Paxman v. Wilkerson, Civil Action No. 638-71-R (E.D. Va. November 15, 1972) 32
Peters v. Kiff, 407 U.S. 493 (1972) 42

Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) 68

Radice v. New York, 264 U.S. 292 (1924) 38
Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) 33, 34
Reed v. Reed, 404 U.S. 71 (1971) 18, 22, 31, 32, 34, 38, 41, 43
Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971) 39
Riley v. Massachusetts, 232 U.S. 671 (1914) 38
Rinehart v. Westinghouse Electric Corp., Civil Action No. 70-537 (E.D. Ohio November 2, 1972) 38
Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972) 32

PAGE

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 39
F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 22, 60
Ruggiero v. Manchin, 456 F.2d 1282 (4th Cir. 1972) 24

Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 485 P.2d 529 (1971) 28, 30, 41
Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972), *pet. for cert. filed*, 41 U.S.L.W. 3261 (U.S. Sept. 21, 1972) (No. 474) 33
Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969) 67
Schneider v. Rusk, 377 U.S. 163 (1964) 20
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 35
Seidenberg v. McSorleys' Old Ale House, 308 F. Supp. 1253 (S.D.N.Y. 1969), 317 F. Supp. 593 (S.D.N.Y. 1970) 30, 41
Shapiro v. Thompson, 394 U.S. 618 (1969) 20, 58, 59
Shpritzer, Matter of v. Lang, 17 A.D.2d 285, 234 N.Y.S. 2d 285 (1st Dept. 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) 31
Shull v. Columbus Municipal Separate School District, 338 F. Supp. 1376 (N.D. Miss. 1972) 33
Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) 20-21, 68
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 62
Stanley v. Illinois, 405 U.S. 645 (1972) 43, 49, 50
State v. Bearcub, 465 P.2d 252 (Ore. Ct. App. 1970) 36
State v. Hall, 187 So. 2d 861 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) 49
State v. Heitman, 105 Kan. 139, 181 P. 630 (1919) 26

PAGE

State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956) 36
Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 41 U.S.L.W. 3220 (U.S. Oct. 24, 1972) (No. 178) 33
Stuart v. Board of Supervisors, No. 105, Court of Appeals of Maryland, October 9, 1972 49

Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) 23, 39
Truax v. Raich, 239 U.S. 33 (1915) 39

United States v. Darby, 312 U.S. 100 (1941) 38, 39
United States v. Dege, 364 U.S. 51 (1960) 40
United States ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) 31
Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) 23, 60, 67
Welsh v. United States, 398 U.S. 333 (1970) 21, 68
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 38
White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) 28, 30
Williams v. Illinois, 399 U.S. 235 (1970) 59
Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971) 30
Williams v. Rhodes, 393 U.S. 23 (1968) 58
Williams v. Richardson, 347 F. Supp. 544 (W.D.N.C. 1972) 67
Williams v. San Francisco Unified School District, 340 F. Supp. 438 (N.D. Calif. 1972) 32
Wilson v. Hacker, 101 N.Y.S.2d 461 (Sup. Ct. 1950) .. 31

Yale & Towne Mfg. Co. v. Travis, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) 68

PAGE

Constitutional Provisions:

United States Constitution
Article IV, §2 35
Fifth Amendment 3, 5, 6, 10, 19, 20, 21, 62, 67, 69
Fourteenth Amendment 19, 20, 35, 36
Nineteenth Amendment 17

Regulations:

Air Force Manual 36-5, Sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (Sept. 30, 1970) 18
Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30 242 ..... 3, 10
3 C.F.R. §339 56
29 C.F.R. §§800.5–800.12 55
29 C.F.R. §§1604.1–1604.10 54
41 C.F.R. §§60-1.26–60-1.32 56
41 C.F.R. §§60-20.1–60-20.6 ..... 56, 57

Statutes:

5 U.S.C. §2108 (P.L. 92-187, 85 Stat. 644) 51, 52
5 U.S.C. §5924 53
5 U.S.C. §7152 51
5 U.S.C. §8101(6) 51
5 U.S.C. §8101(11) 51
5 U.S.C. §8110 51
5 U.S.C. §8133 51
5 U.S.C. §8341 (P.L. 91-658, 84 Stat. 1961) 52
10 U.S.C. §§1072 and 1073 ..... *passim*
10 U.S.C. §8215 18
28 U.S.C. §1253 2
29 U.S.C. §206(d) (Equal Pay Act of 1963) 18, 55, 57
37 U.S.C. §§401 and 403 ..... *passim*

PAGE

38 U.S.C. §102(b) (P.L. 92-540, 86 Stat. 1074) 53
38 U.S.C. §104 (P.L. 92-603) 67
38 U.S.C. §1682 53
42 U.S.C. §2000e *et seq.* (Title VII of the Civil Rights Act of 1964) 18, 19, 38, 54, 55, 68
Section 906(b)(1) of the Education Amendments of 1972, P.L. 92-318, 86 Stat. 375 19
Equal Employment Opportunity Act of 1972 19

Other Authorities:

Act of Oct. 12, 1949, ch. 681, 63 Stat. 764 63
Act of June 7, 1956, ch. 374, 70 Stat. 250 63
American Women 1963-1968, Report of the Interdepartmental Committee on the Status of Women, and 4 Task Force reports of the Citizens' Advisory Council (1968) 18, 24
American Women, Report of the President's Commission on the Status of Women, and 7 committee reports (1963) 18, 20, 24

Baker, Protective Labor Legislation (1925) 37, 39-40
Bird, Born Female : The High Cost of Keeping Women Down (1968) 11
1 Blackstone's Commentaries on the Laws of England (3d ed. 1768) 14, 15

The Changing Roles of Men and Women (E. Dahlstrom ed. 1967) 27
Cong. Globe, 39 Cong., 2d Sess., Part I, p. 66 13
95 Cong. Rec. 7662 (1949) 63, 64
95 Cong. Rec. 7671 (1949) 65
95 Cong. Rec. 13194 (1949) 63
95 Cong. Rec. 13195 (1949) 64
102 Cong. Rec. 8043 (1956) 64

PAGE

102 Cong. Rec. 3850 (1956) 63
116 Cong. Rec. 28005 (1970) 19
118 Cong. Rec. S4564 (daily ed., Mar. 22, 1972) 19
H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Ad. News, Vol. III, 5931 52
Senate Comm. on Armed Services, S. Rep. No. 1878, 84th Cong., 2d Sess., 1956 U.S. Code, Cong. & Ad. News, Vol. 2, 2698 63
S. Rep. No. 733, 81st Cong., 1st Sess., 1949 U.S. Code, Cong. & Ad. News, Vol. 2, 2089 63
S. Rep. No. 92-1218, 92d Cong., 2d Sess. 2 (1972) 46
Crozier, Constitutionality of Discrimination Based on Sex, 15 B.U.L. Rev. 723 (1935) 28
Crozier, Regulation of Conditions of Employment of Women: A Critique of *Muller* v. *Oregon*, 13 B.U.L. Rev. 276 (1933) 37
de Tocqueville, Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classics Series, Galaxy ed., p. 400 (1947) 12
Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 18
Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) 22
Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 Val. L. Rev. 281 (1971) 28

EEOC Decisions:

Case No. CL 7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969) 55
Case No. YNY 9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969) 55

PAGE

Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (Aug. 13, 1969) 55
Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (Feb. 4, 1970) 55
Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (Feb. 4, 1970) 55
Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (Mar. 24, 1970) 55
Decision No. 71-562, CCH Emp. Practices Guide ¶6184 (Dec. 4, 1970) 55
Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (Dec. 31, 1970) 55
Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (Dec. 27, 1971) 55
Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972) 55
W & H Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (Oct. 14, 1965) 56
W & H Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (Feb. 11, 1966) 56
W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (Feb. 11, 1966) 56

Ferriss, Indicators of Trends in the Status of American Women 103 (1971) 25, 26
Flexner, Century of Struggle: The Women's Rights Movement in the United States 203 (1970 ed.) 13, 14, 17, 37

Gruberg, Women in American Politics 4 (1968) 11

Hand, The Spirit of Liberty 160 (Dillard ed. 1952) 28
Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess. 725 (1970) 43

PAGE

History of Woman Suffrage, Vol. I (E.C. Stanton, S.B. Anthony & N.J. Gage, eds. 1881) 16

Hodes, Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment, 25 Rutgers L. Rev. 26 (1970) 36

Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971) 11, 27, 34

Jencks & Reisman, The Academic Revolution (1968) .. 30

Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971) 28, 36, 40, 42, 43

Kanowitz, Women and the Law: The Unfinished Revolution (1969) 14, 17, 18, 24

Kay, Book Review [Marriage Stability, Divorce, and the Law], 60 Calif. L. Rev. 1683 (Nov. 1972) 24

Kraditor, Up From the Pedestal: Selected Writings in the History of American Feminism (1968) 12-13, 15

The Lawes Resolutions of Women's Rights (London, 1632) 14

Martineau, Society in America, Vol. 2, 81 (1842, 1st ed. 1837) 14

A Matter of Simple Justice, Report of the President's Task Force on Women's Rights and Responsibilities (1970) 18

Meyer, Introduction to H. Ibsen, A Doll's House (M. Meyer transl. 1965) 12

Montagu, Man's Most Dangerous Myth (4th ed. 1964) .. 27

Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615 (1970) 18-19

Murray, The Rights of Women, in The Rights of Americans: What They Are—What They Should Be (N. Dorsen ed. 1971) 18, 37

Myrdal, An American Dilemma (2d ed. 1962) 14-15, 27

PAGE

Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171 (1971) 41

Note, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nev. U.L. Rev. 481 (1971) 28

Note, The Constitutionality of Sex Separation in School Desegregation Plans, 37 U. Chi. L. Rev. 296 (1971) .. 30

Note, 54 Harv. L. Rev. 1078 (1941) 68

Note, 55 Harv. L. Rev. 1030 (1942) 68

Note, 84 Harv. L. Rev. 1499 (1971) 28

O'Neill, Everyone Was Brave: The Rise and Fall of Feminism in America (1969) 17

Phillips, On Location with the WACS, Ms., Nov. 1972, 53 48

Read & Petersen, Sex Discrimination in Law School Placement, 18 Wayne L. Rev. 639 (1972) 35

Report of the Special Subcommittee on the Utilization of Manpower in the Military of the House Committee on Armed Services, H.A.S.C. No. 92-51, 92d Cong., 1st & 2d Sess. 12439 (1972) 66

Report of the Special Subcommittee on the Utilization of Manpower in the Military of the House Committee on Armed Services, H.A.S.C. No. 92-58, 92d Cong., 2d Sess., 14661 (1972) 66

Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972) 19

2 Story, Commentaries on the Constitution Section 1939 (5th ed. 1891) 19

Tennyson, Alfred Lord, Locksley Hall (1842) 13

Travis, The U. S. Labor Force: Projections to 1985, 93 Monthly Labor Rev., May 1970 45

PAGE

U. S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 25

U. S. Women's Bureau, Dept. of Labor, Bull. No. 294, 1969 Handbook on Women Workers 39 (1969) 25

U. S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap 1 (rev. ed. Dec. 1971) 26, 45

U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W.B. Pub. No. 72-191 Mar. 1972) 45

U. S. Women's Bureau, Dept. of Labor, Twenty Facts on Women Workers 2 (1972) 26

U. S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. July 1972) 25, 26

Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968) 47

Waldman, Changes in the Labor Force Activity of Women, 93 Monthly Labor Rev., June 1970, 10, 11 25

Waldman & Young, Marital and Family Characteristics of Workers, March 1970, March 1971, 94 Monthly Labor Rev. 46 25

Watson, Social Psychology: Issues and Insights (1966) 27

Would Women Suffrage Be Unwise?, 22 Ladies Home Journal 7-8 (Oct. 1905) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of 180,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that discrimination against women permeates society at every level, and is often reinforced by governmental action, the American Civil Liberties Union

[1] This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

has established a Women's Rights Project to work toward the elimination of sex-based discrimination. *Amicus* believes that this case, concerning the rights of married servicewomen to the same fringe benefits as those given married servicemen, poses a constitutional issue of great significance to the achievement of full equality under the law between the sexes.

Opinion Below

The opinion of the United States District Court for the Middle District of Alabama, Northern Division, is reported at 341 F. Supp. 201 (1972). It is also set out in the Appendix to the Jurisdictional Statement (J.S. at 1a-21a).[1]

Jurisdiction

On April 5, 1972, the United States District Court for the Middle District of Alabama, Northern Division, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the Middle District of Alabama, Northern Division, on April 26, 1972 (J.S. at 22a). The Jurisdictional Statement was filed on June 26, 1972, and probable jurisdiction was noted on October 10, 1972.

The jurisdiction of the Supreme Court to review this decision of the United States District Court on appeal is conferred by Title 28 U.S.C. Section 1253. The following deci-

[1] References to the Jurisdictional Statement are designated herein by the abbreviation "J.S.".

sions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

Statutes and Regulations Involved

Title 37 U.S.C. Sections 401 and 403, Title 10 U.S.C. Sections 1072 and 1076, and Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242, are set out in the Jurisdictional Statement at 23a *et seq.*

Question Presented

Whether the classification according to sex made by 37 U.S.C. Sections 401 and 403, and 10 U.S.C. Sections 1072 and 1076, which provide "dependency" allowances automatically for the spouse of male members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of female members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more than one-half of his support, violates the due process clause of the fifth amendment to the United States Constitution.

Statement of the Case

Appellant Sharron Frontiero joined the Air Force on October 1, 1968, for an obligated period of service of four years. On December 17, 1969, she married appellant Joseph Frontiero, who was and remains a full-time student at

Huntington College, Montgomery, Alabama. As stated in the agreed stipulation of fact on the basis of which this action was heard and determined, appellant Joseph Frontiero's total expenses are approximately $354.00 per month. With the exception of $205.00 per month which appellant Joseph Frontiero receives under the educational provisions of the G.I. Bill and $30.00 per month income from a part-time job, appellant Sharron Frontiero provides the sole support for both appellants.

The provisions of 37 U.S.C. Sections 401 and 403 grant a supplemental housing allowance to armed forces members living off-base (Basic Allowance for Quarters—BAQ), the allowance varying with the number of dependents claimed by the armed forces member. Male members are allowed to claim their spouses as dependents, and hence to gain extra benefits, regardless of the wives' actual financial dependency. The statute sets up a different definition of dependency for female armed forces members, allowing the females to claim their spouses as dependents, and hence gain supplemental benefits, only if the husband is in fact dependent upon the female service member for over one-half of his support.[1]

In the fall of 1970, after consulting with her commanding officer and a representative of the Base Legal Office, appellant Sharron Frontiero advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional housing allowance that would have been granted automatically to males with spouses. Col. Jernigan informed her that the regulations

[1] Maxwell Air Force Base (MAFB) does not provide any base housing for the families of married female members of the Air Force. Complaint, para. III (2).

prohibited such allowances. In November, 1970, pursuant to the advice of a member of the Inspector General's staff, MAFB, appellant Sharron Frontiero submitted a formal complaint. Approximately one week thereafter, appellant Sharron Frontiero was informed that the complaint had been reviewed and that she was ineligible for any housing allowance.

Under 10 U.S.C. Sections 1072 and 1076, the wife and children of military personnel are entitled to comprehensive medical benefits, regardless of their potential or actual income. However, the husband of a female member of the armed forces is not entitled to any medical benefits unless he is "in fact dependent upon" the female member for more than one-half of his support (J.S. at 27a-29a). Appellant Sharron Frontiero seeks extension of these medical benefits to her spouse, appellant Joseph Frontiero.

On December 23, 1970, appellants filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, asserting that the distinctions drawn by these statutes and regulations, insofar as they required different treatment for female and male members of the uniformed services, arbitrarily and unreasonably discriminate against appellants and therefore violate the due process clause of the fifth amendment to the United States Constitution.

Over the dissent of Judge Johnson, the district court held that "the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and . . . are in all respects constitutional." 341 F. Supp. at 209 (J.S. at 15a-16a).

Summary of Argument

I.

37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076, providing that all wives of servicemen are eligible for housing allowances and medical benefits but only husbands of servicewomen who actually receive more than half their support from their wives are eligible for these allowances and benefits, denies appellants the equal protection of the law guaranteed by the due process clause of the fifth amendment.

Historically, women have been treated as subordinate and inferior to men. Although some progress toward erasing sex discrimination has been made, the distance to equal opportunity for women in the United States remains considerable. Like other groups that have been assisted toward full equality before the law via the "suspect classification" doctrine, women are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. Absent firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

II.

The distinctions between male and female members of the armed forces established by 37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076 create a "suspect classification" requiring close judicial scrutiny.

The challenged classification, based solely on sex, rests upon a foundation of myth and custom which assumes that the male is the dominant partner in marriage and which reinforces restrictive and outdated sex role stereotypes about married women and their participation in the work force. In recent years the national conscience has been awakened to the sometimes subtle injury inflicted on women by these stereotypes. Enlightened courts have begun to strike down discriminatory sex-based classifications as inconsistent with the equal protection guarantees of the Constitution. Nevertheless there is still substantial judicial confusion as to the standard of review appropriate to these challenges.

Recent changes in society's attitudes toward equal opportunity for men and women have made the underlying premise of the "suspect classification" clear: although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference. The time is now ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw "a sharp line between the sexes," just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible. *Amicus* is asking this Court to add legislative distinctions based on sex to the category of "suspect" classifications.

III.

The challenged classification is not justified by administrative convenience, the primary rationale relied on by the the court below. There is every indication, given the fact that almost 60% of married women work, that the increased cost of administration, if the test of actual dependency were applied to servicemen and their spouses, would be more than offset by the resultant reduction in benefits paid out. Apart from the question of whether the challenged classification actually results in financial savings, the administrative convenience rationale has been rejected by this Court, lower federal courts and, with regard to benefits payable to veterans and non-military federal employees, by the Congress, as a justification for discriminatory sex-based classifications. Finally, federal law prohibits private and state employers from engaging in practices like those challenged in the case at bar.

IV.

The discrimination against women mandated by the challenged classification is neither supported by a compelling state interest, necessary to the accomplishment of legitimate legislative objectives nor reasonably related to a permissible legislative objective. It is well established that convenience and simplicity, while admirable virtues in the administration of public affairs, do not constitute a compelling state interest. If the Court concludes that sex is not a suspect classification, or defers determination of this issue, *amicus* urges that it apply an intermediate test, developed in previous decisions of the Court: the challenged classification should be "closely scrutinized" to determine whether it is "necessary to the accomplishment of legitimate

legislative objectives." Even if the "rational relationship" test is applied, the challenged classifications do not pass constitutional muster: it is doubtful that the goal of administrative convenience is in fact served by the challenged classification; in any event, administrative convenience has been rejected by this Court under the rational relationship test as a justification for sex-based classifications.

V.

Upon finding that the challenged provisions violate the fifth amendment, the Court should remedy the defect by extending to female members of the armed forces the same benefits now available to male members. The dominant purpose of the statutes in which the challenged provisions appear, to attract and retain competent men and women in the armed forces, impels the remedy of extension. This remedy has been employed in numerous comparable cases by the Court. Recent action of the Congress to equalize fringe benefits available to male and female veterans and non-military federal employees by extending the benefits to the sex suffering discrimination, provides a clear indication of its remedial preference.

ARGUMENT

Introduction

Appellant, Lieutenant Sharron Frontiero, on the sole ground that she is a woman, has been denied medical benefits and a supplemental housing allowance for her civilian spouse, appellant Joseph Frontiero. 10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403 arbi-

trarily distinguish between male and female service members with respect to the benefits their spouses may receive. Under these statutes spouses of male members of the uniformed services are classified as "dependents" whether or not they are in fact; spouses of female members are classified as "dependents" only if the husband is in fact dependent on his wife for more than one-half of his support. Further, a regulation implementing 37 U.S.C. Sections 401 and 403, still in effect at the time the Jurisdictional Statement in this case was filed, disqualifies even wholly dependent spouses of female members unless they are mentally or physically incapable of self-support. Dep't of Defense, Military Pay and Allowance Entitlements Manual Section 30242 (J.S. at 30a). Underscoring the stark double standard embodied in this scheme, the regulation states explicitly that a servicewoman who assumes support of a husband attending college does not have a dependent spouse; a serviceman whose wife is capable of self-support but spends her days attending college continues automatically to receive full dependency allowances.[4]

The central question raised in this case is whether Congress, consistent with the equal protection principle inherent in the due process clause of the fifth amendment,[5] may legislate that married female members of the armed forces

---

[4] A letter from the Deputy Comptroller General of the United States to the Secretary of Defense [B-161261], dated July 3, 1972, states that effective that date ". . . a female member of the uniformed services may be considered as having a dependent husband within the meaning of 37 U.S.C. 401 where there is sufficient evidence to establish his dependence on her for more than one-half of his support without regard to the husband's mental or physical capability to support himself."

[5] *See* pp. 20-21 *infra*.

must meet a "dependent spouse" requirement in order to receive fringe benefits granted automatically to similarly situated male members. The statutes at issue classify married male members of the armed forces as dominant partners in their marriage, but assign to married female members a subordinate status, absent proof that they supply more than half of their husbands' support. It is the position of *amicus* that this sex-based classification, established for a purpose unrelated to any biological difference between the sexes, cannot survive constitutional review.

I.

Historical Perspective

"'Man's world' and 'woman's place' have confronted each other since Scylla first faced Charybdis."[6] A person born female continues to be branded inferior for this congenital and unalterable condition of birth.[7] Her position in this country, at its inception, is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decision-making councils:

> Were out state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men. Quoted in M. Gruberg, Women in American Politics 4 (1968).

---

[6] E. Janeway, Man's World Woman's Place: A Study in Social Mythology 7 (1971).

[7] *See* C. Bird, Born Female: The High Cost of Keeping Women Down (1968).

Alexis de Tocqueville, some years later, included this observation among his commentaries on life in the young United States:

> In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life .... Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classics Series, Galaxy ed., p. 400 (1947).[8]

During the long debate over women's suffrage the prevailing view of the partition thought ordained by the Creator was rehearsed frequently in the press and in legislative chambers. For example, an editorial in the New York Herald in 1852 asked:

> How did women first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed .... Quoted in A. Kraditor, Up From the Pedestal:

---

[8] *Cf.* Ibsen's observation on the society of his day:

> A woman cannot be herself in a modern society. It is an exclusively male society with laws made by men, and with prosecutors and judges who assess female conduct from a male standpoint. Quoted in Meyer, Introduction to H. Ibsen, A Doll's House at 9 (M. Meyer transl. 1965).

Selected Writings in the History of American Feminism 190 (1968).

And a legislator commented during an 1866 debate in Congress:

> It seems to me as if the God of our race has stamped upon [the women of America] a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life. They have a higher and holier mission. It is in retiracy [sic] to make the character of coming men. Their mission is at home, by their blandishments and their love to assuage the passions of men as they come in from the battle of life, and not themselves by joining in the contest to add fuel to the very flames . . . . It will be a sorry day for this country when those vestal fires of love and piety are put out. Quoted in E. Flexner, Century of Struggle 148-49 (1970 ed.), from Cong. Globe, 39 Cong., 2d Sess., Part I, p. 66.

The common law heritage, a source of pride for men, marked the wife as her husband's chattel, "something better than his dog, a little dearer than his horse."* Blackstone explained:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence

* Alfred Lord Tennyson, Locksley Hall (1842).

> of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. 1 Blackstone's Commentaries on the Law of England 442 (3d ed. 1768).[10]

Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes, although the white woman ranked as "chief slave of the harem."[11] Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names. Men controlled the behavior of both their slaves and their wives and had legally enforceable rights to their services without compensation. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969). As Gunnar Myrdal remarked, the parallel was not accidental, for the legal status of women and children served as the model for the legal status assigned to black slaves:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power.

---

[10] An earlier formulation of the same thesis was set out in The Lawes Resolutions of Womens Rights (London, 1632):

> Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soon as she is married, is called *covert*, in Latin, *nupta*, that is, *veiled*, as it were, clouded and overshadowed, she hath lost her streame. . . . To a married woman, her new self is her superior, her companion, her master. Quoted in E. Flexner, Century of Struggle 7-8 (1970 ed.).

[11] Comment attributed to Dolly Madison, in H. Martineau, Society in America, Vol. 2, 81 (1842, 1st ed. 1837).

When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules and other property—could be invoked, as well as a great number of other passages of Holy Scripture. An American Dilemma 1073 (2d ed. 1962).

In answer to feminist protests, the legal disabilities imposed on women were rationalized at the turn of the century much as they were at an earlier age. Blackstone set the pattern:

> [E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England. 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768).

Grover Cleveland echoed this rationale, arguing that, although women were denied the vote, the statute books were full of proof of the chivalrous concern of male legislators for the rights of women. Would Women Suffrage Be Unwise?, 22 Ladies Home Journal 7-8 (Oct. 1905), quoted in A. Kraditor, Up From the Pedestal: Selected Writings in the History of American Feminism 199-203 (1968).

American women assessed their situation from a different perspective. At the Women's Rights Convention in Seneca Falls, New York, in 1848, a declaration of women's rights was drafted which included the following sentiments:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward

> woman, having in direct object the establishment of an absolute tyranny over her . . . .
>
> He has compelled her to submit to laws, in the formation of which she had no voice.
>
> • • • • •
>
> He has taken from her all right in property, even to the wages she earns.
>
> • • • • •
>
> . . . . In the covenant of marriage, . . . the law gives him power to deprive her of her liberty, and to administer chastisement.
>
> • • • • •
>
> . . . . He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. . . .
>
> • • • • •
>
> He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.
>
> History of Woman Suffrage, Vol. I, at 70-75 (E.C. Stanton, S.B. Anthony & N.J. Gage eds. 1881).

Men viewing their world without rose-colored glasses would have noticed in the last century, as those who look will observe today, that no pedestal marks the place occupied by most women. At a women's rights convention in Akron, Ohio, in 1851, Sojourner Truth, an abolitionist and former slave, responded poignantly to the taunts of clergy-

men who maintained that women held a favored position and were too weak to vote:

> The man over there says women need to be helped into carriages and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages or over puddles, or gives me the best place —and ain't I a woman?
>
> Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me—and ain't I a woman?

E. Flexner, Century of Struggle 90-91 (1970 ed.).

Of course, the legal status of women has improved since the Nineteenth Century. The Married Women's Property Acts, passed in the middle of the Nineteenth Century, opened the door to a measure of economic independence for married women. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 40-41 (1969). The nineteenth amendment gave women the vote in 1920, after almost three-quarters of a century of struggle.[12] But, even in the 1970's, woman's place as subordinate to men is still reflected in many statutes regulating diverse aspects of

[12] *See* E. Flexner, Century of Struggle (1970 ed.); W. O'Neill, Everyone Was Brave: The Rise and Fall of Feminism in America (1969).

life.[13] A small sample of those statutes is contained in the Appendix to Brief for Appellant at 69-88, *Reed* v. *Reed*, 404 U.S. 71 (1971).

In very recent years, a new appreciation of woman's place has been generated in the United States.[14] Activated by feminists of both sexes, legislatures and courts have begun to recognize and respond to the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them. The awakening national consciousness that equal opportunity for men and women is a matter of simple justice has led to significant reform, most notably on the federal level: Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. Section 206(d), and executive orders designed to eliminate discrimination against women in federal employment and in employment under federal contract.[15]

---

[13] For example, apart from the discrimination in fringe benefits once women enter the military, they are subjected in the first instance to a statutory quota drastically limiting their opportunity for entry. *See* 10 U.S.C. Section 8215 (women enlistees and officers may not constitute more than 2% of the Regular Air Force). For other qualifications applied to women but not to men, *see* Air Force Manual 36-5, sections 2-2(n), 2-13(d)(2), 3-1(a)(19) (Sept. 30, 1970).

[14] *See, e.g.*, American Women, Report of the President's Commission on the Status of Women, and seven accompanying committee reports (1963); American Women 1963-1968, Report of the Interdepartmental Committee on the Status of Women, and four accompanying Task Force reports of the Citizens' Advisory Council (1968); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969); A Matter of Simple Justice, Report of the President's Task Force on Women's Rights and Responsibilities (1970); Murray, The Rights of Women, in The Rights of Americans: What They Are—What They Should Be 521 (N. Dorsen ed. 1971).

[15] *See generally*, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Murphy, Female Wage Discrimination: A Study

The overwhelming approval of the Equal Rights Amendment to the United States Constitution confirms the dominant intent of Congress to terminate sex-based discrimination by law. In the course of the debate on the Amendment, however, Congress made plain its view that appropriate construction and application of the fifth and fourteenth amendments would amply secure equality of rights and responsibilities between the sexes.[16] Nonetheless, Congress wishes to provide further assurances so there would not be the slightest doubt that the right of men and women to equal treatment under the law would be recognized as a fundamental constitutional principle.[17]

In 1963, the President's Commission on the Status of Women concluded that "equality of rights under the law

---

of the Equal Pay Act 1963-70, 39 U. Cin. L. Rev. 615 (1970). In 1972, Congress extended the range of Title VII via the Equal Employment Opportunity Act of that year. *See* Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972). The protection of the Equal Pay Act was also extended in 1972. *See* Section 906(b)(1) of the Education Amendments of 1972, P.L. 92-318, 86 Stat. 375 (executive, administrative, professional, and outside sales employees covered).

[16] *See* 116 Cong. Rec. 28005 (1970) (Statement of Representative Martha Griffiths) ("There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today."); 118 Cong. Rec. S4564 (daily ed., Mar. 22, 1972) (Statement of Senator Tunney) ("... if the courts were to move forward with regard to interpreting the 14th amendment to afford true equal protection for women, the new amendment could be redundant. Even so, the enactment ... will symbolize and emphasize this country's dedication to providing true equality for all.").

[17] *Cf.* 2 J. Story, Commentaries on the Constitution Section 1939 (5th ed. 1891):

> [T]he repetition of securities [for individual rights] may well be excused so long as the slightest doubt of their having been already sufficiently declared shall anywhere be found to exist.

for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land."[18] The Commission believed that this principle was embodied in the fifth and fourteenth amendments, and looked to this Court for "imperative" clarification to eliminate "remaining ambiguities with respect to the constitutional protection of women's rights." The case at bar presents an opportunity for definitive pronouncement providing this overdue clarification.

II.

The statutes at issue discriminate against female members of the uniformed services and constitute a denial of equal protection of the laws, guaranteed by the due process clause of the fifth amendment.

A. *The fifth amendment due process clause encompasses guarantees of security from arbitrary treatment and of equal protection of the laws; appellants' case rests upon these fundamental guarantees.*

The due process clause of the fifth amendment to the Constitution, commanding and regulating federal action and legislation, guarantees to every person security from arbitrary treatment and the equal protection of the laws. In this regard, the fifth amendment imposes the same obligation upon the federal government as the fourteenth amendment does upon the states. *See Shapiro* v. *Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d

[18] President's Commission on the Status of Women, American Women 44-45 (1963).

959, 969-70 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964); *Davis* v. *Richardson*, 342 F. Supp. 588, 591 (D. Conn. 1972) (three-judge court); *Morris* v. *Richardson*, 346 F. Supp. 494, 499 (N.D. Ga. 1972) (three-judge court); *Miller* v. *Laird*, Civil No. 752-71 (D.D.C. Aug. 31, 1972) (three-judge court); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). *See also* Brief for Appellee at 28, *Welsh* v. *United States*, 398 U.S. 333 (1970) (federal government's affirmation that "equal protection" notion implicit in the fifth amendment precludes federal authorities from acting arbitrarily or capriciously and from engaging in invidious discrimination). Moreover, it is plain that "where treatment accorded is based on sex the classification is subject to scrutiny under equal protection principles. . . . [A]nd those principles of equal protection . . . apply . . . as part of due process under the Fifth Amendment." *Moritz* v. *Commissioner of Internal Revenue*, No. 71-1127, — F.2d — (10th Cir. Nov. 22, 1972).

B. The classification at issue in this case is based solely on sex.

10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403, require male as well as female members of the armed forces to prove the dependency in fact of certain relatives (*e.g.*, parents) as a condition of the grant of benefits. The majority below, pointing to such provisions, stated that "the statutory scheme as a whole does not differentiate invidiously on the basis of sex," and concluded, "perforce, then, there is no abridgment of the Constitution." 341 F. Supp. at 206 (J.S. at 8a).

In this the majority below was in error. While it is often appropriate to look to the statutory scheme as a whole to resolve uncertainties about the meaning of a section of a

statute, a provision of a statute challenged as unconstitutional cannot be saved by the constitutionality of the remaining sections. The statutory provisions at issue in this case are not those that treat male and female members of the armed forces equally, but precisely those that treat them differently. They require a female member to prove the dependency of her spouse before receiving benefits for him while granting fringe benefits to a male member for his spouse without regard to her dependency upon him. As Judge Johnson stated in his dissenting opinion, "the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case." 341 F. Supp. at 210 (J.S. at 17a).

C. *Equal protection standards of review.*

In determining whether legislation violates the concept of equal protection, the courts have applied standards of review ranging from lenient to stringent. *See* Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "rational relationship" test applicable in the generality of cases; (2) the "rigid scrutiny" test met only by demonstration of a "compelling state interest," applicable when the legislation relates to a "fundamental right or interest" or invokes a "suspect" criterion.

To survive the "rational relationship" test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), cited with approval in *Reed* v. *Reed*, 404 U.S. at 76. The more stringent test is exemplified in cases dealing with the right

to vote, and the right to travel, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 667, 670 (1966) (poll tax in state elections); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (durational residence requirements for voting), and in cases involving classification based on race, ancestry or national origin, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365 (1971); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948).

In addition to the two commonly articulated review standards, some of the decisions of this Court suggest an intermediate standard: the legislation is "closely scrutinized," and the proponent of the challenged classification is required to show that it is "necessary to the accomplishment of legitimate [legislative] objectives." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972); *cf. Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

With respect to the standard of review in this case, our position is three-fold: (1) 37 U.S.C. Sections 401 and 403 and 10 U.S.C. Sections 1072 and 1076 establish a suspect classification for which no compelling justification can be shown; alternatively, (2) the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective; and, finally, (3) without regard to the suspect or invidious nature of the classification, the line drawn by Congress, distinguishing between married servicemen and married servicewomen for purposes of fringe benefits, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.

D. Rather than assigning a "heavy burden" to appellants and applying a "lenient" standard of review, the court below should have subjected 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 to close scrutiny, identifying sex as a "suspect" criterion for legislative distinctions.

1. The challenged classification rests upon a view of the married woman which does not accord with present day reality.

The challenged classification, which assumes that the man is the dominant partner in a marriage and that the woman occupies a subordinate position, rests upon a foundation of myth and custom still reflected in myriad laws,[19] but out of tune with conditions of life in this second half of the Twentieth Century. Such classifications once appeared to jurists as "benign," benefiting women who occupied the traditional role of mother and homemaker,[20] or "neutral," accurately describing social reality. Examined from a contemporary perspective, however, these classifications reinforce restrictive and outdated sex-role stereotypes and penalize married women who do not conform to the assumed general pattern.

National statistics relegate to myth the notions that relatively few married women work, and that when they do,

---

[19] For a catalogue, *see* Kay, Book Review [Marriage Stability, Divorce, and the Law], 60 Calif. L. Rev. 1683 (Nov. 1972). *See also* L. Kanowitz, *supra*, at 35-99; Citizens' Advisory Council on the Status of Women, Report of the Task Force on Family Law and Policy (1968); President's Commission on the Status of Women, Report of the Committee on Civil and Political Rights (1963).

[20] *But cf. Ruggiero* v. *Manchin*, 456 F.2d 1282 (4th Cir. 1972) (although husband was the dominant breadwinner in the family, he was "dependent" upon his wife for services that have a pecuniary value).

their earnings are "pin money" rather than an essential part of the family's finances. In April, 1971, 42.7% of all women 16 years of age or older were in the labor force, compared with 28.9% in March, 1940.[21] Of these women, 18.5 million, or 58.5% of working women, were married and living with their husbands.[22] This is almost twice the rate of 1940.[23] From 1960 to 1970, nearly half of the increase in the labor force was accounted for by married women.[24] And for the last four years, married women have made up the largest portion of the annual increase in the civilian labor force.[25] Married women of all ages are increasing their rate of labor force participation while other groups are not.[26]

Nor are these largely families where the husband is unemployed.[27] In 42% of families where both spouses were present, both were employed.[28] Of women who work, the number of wives in the labor force with working husbands has been increasing at a faster rate than the number of working wives with husbands who are not employed.[29]

---

[21] U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971).

[22] U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. July 1972) [hereinafter cited as Why Women Work].

[23] U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, 1969 Handbook on Women Workers 39 (1969).

[24] Waldman, Changes in the Labor Force Activity of Women, 93 Monthly Labor Rev., June 1970, 10, 11.

[25] Waldman & Young, Marital and Family Characteristics of Workers, March 1970, March 1971, 94 Monthly Labor Rev. 46.

[26] A. Ferriss, Indicators of Trends in the Status of American Women 103 (1971) [hereinafter cited as Ferriss].

[27] 7.6 million husbands were not in the labor force or were unemployed in March, 1971. Why Women Work at 2.

[28] Ferriss at 95.

[29] *Id.*

Thus, at present, the husband's unemployment is not a prime indicator of the wife's labor force status.[20]

Neither the dramatic increase in women's labor market participation, nor statutory remedies against sex discrimination in employment, however, has halted discrimination against working women. The median annual income in 1970 for full-time work was $8,966 for men and $5,323 for women; *i.e.*, women earned 59.4% of the male median income.[21] This differential is in large part the product of multiple discrimination: in base pay; in fringe benefits; and in tracking women into lower paying and less responsible jobs and keeping them there. The most frequently offered justification for these practices is that women are merely secondary earners; as "pin money" workers, they want less responsibility and thus deserve lower pay even for the same job. But in fact, the financial contribution of the "assistant breadwinner" frequently means the difference between poverty and a decent standard of living for her family.[22] In 23.4% (or 7.4 million) of families with both spouses working, the husbands earned less than $7,000 ($6,960 is estimated by the Bureau of Labor Statistics as sufficient to provide only a low standard of living for an urban family of four).[23]

Sharron and Joseph Frontiero fall into this last mentioned income category. Both are financial contributors; Joseph Frontiero's G.I. bill stipend amounts to $205 per

---

[20] *Id.*

[21] U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap 1 (rev. ed. Dec. 1971).

[22] U.S. Women's Bureau, Dept. of Labor, Twenty Facts on Women Workers 2 (1972).

[23] Why Women Work at 1.

month. His income totals approximately $2,820 per year, hardly enough by any realistic standard to warrant the conclusion that he is financially independent of his wife. In this marriage, the wife is presently the primary wage-earner; the husband, the "assistant breadwinner." The benefits appellants have been denied would significantly supplement a very moderate family income. These benefits are an integral part of the compensation men in Lt. Frontiero's situation receive automatically. Appellants Sharron and Joseph Frontiero do not receive them, because her labor, by congressional mandate, is worth less than the labor of a similarly situated man in terms of the benefits it brings to the family unit.

2. Enlightened courts have begun to strike down discriminatory sex-based classifications as inconsistent with the equal protection guarantees of the United States Constitution; but there is substantial confusion as to the standard of review appropriate to these challenges.

The significant changes that have occurred in society's attitudes toward equal opportunity for men and women[14] should yield a deeper appreciation of the premise underlying the "suspect classification" doctrine: although the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable traits of birth over which the individual has no control and for which he or she should not be penalized.

---

[14] *See, e.g.*, The Changing Roles of Men and Women (E. Dahlstrom ed. 1967); E. Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971); A. Montagu, Man's Most Dangerous Myth 181-84 (4th ed. 1964); G. Myrdal, An American Dilemma 1073-78 (2d ed. 1962); Watson, Social Psychology: Issues and Insights 435-56 (1966).

Such conditions include not only race, lineage and alienage, criteria already declared "suspect" by this Court,[35] but include as well the sex of the individual.[36]

No longer shackled by decisions reflecting social and economic conditions of an earlier era,[37] enlightened judges in both federal and state courts are becoming increasingly skeptical of lines drawn or sanctioned by governmental authority on the basis of sex. A recent decision of the California Supreme Court, *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), exemplifies the new understanding and explicitly denominates sex a suspect classification:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the

---

[35] Although the paradigm suspect classification is, of course, one based on race, this Court has made it plain that the doctrine is not confined to a "two-class theory." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954); *see Graham* v. *Richardson*, 403 U.S. 365 (1971).

[36] *See* Crozier, Constitutionality of Discrimination Based on Sex, 15 B.U.L. Rev. 723, 727-28 (1935); Eastwood, The Double Standard of Justice: Women's Rights Under the Constitution, 5 Val. L. Rev. 281, 296-97 (1971); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675, 738-41 (1971); Note, Are Sex-Based Classifications Constitutionally Suspect?, 66 Nw. U.L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971).

[37] *See Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 669-70 (1966): "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." (Emphasis in original); *White* v. *Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (three-judge court): "The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society." *See also* L. Hand, The Spirit of Liberty 160 (Dillard ed. 1952).

accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. . . .

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental

interest such as employment. 5 Cal. 3d at 18-20, 485 P.2d at 540-41.

In numerous other cases, sex lines unsupported by strong affirmative justification have failed to survive constitutional review. *See, e.g., Mengelkoch* v. *Industrial Welfare Commission,* 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only presents substantial federal constitutional question); *Kirstein* v. *Rector and Visitors of the University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's "prestige" college)[11]; *White* v. *Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (Alabama's exclusion of women from jury service held unconstitutional); *Bennett* v. *Dyer's Chop House,* —— F. Supp. ——, 41 U.S.L.W. 2243 (N.D. Ohio Oct. 26, 1972) and *Seidenberg* v. *McSorleys' Old Ale House,* 317 F. Supp. 593 (S.D.N.Y. 1970), 308 F. Supp. 1253 (S.D.N.Y. 1969) (exclusion of women patrons from liquor licensed place of public accommodation held unconstitutional); *Mollere* v.

---

[11] *Cf. Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.,* 401 U.S. 951 (1971) (females-only admission policy of state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering all-female facility more advantageous educationally than state supported institutions to which males are admitted). *Kirstein* and *Williams* are not in conflict. Pairing the two, they reflect the opinion of distinguished academicians:

> . . . we do not find the argument against women's colleges as persuasive as the argument against men's colleges. This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense. C. Jencks & D. Reisman, The Academic Revolution 298 (1968).

See also Note, The Constitutionality of Sex Separation in School Desegregation Plans, 37 U. Chi. L. Rev. 296 (1971).

Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that unmarried women under 21 live in state college dormitory when no such requirement was imposed on men); *United States ex rel. Robinson* v. *York*, 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for men and women held a violation of equal protection); *Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971) (wife constitutionally entitled to same right as husband to recover for loss of consortium); *Paterson Tavern & Grill Owners Association* v. *Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Commonwealth* v. *Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (differential sentencing laws for men and women held unconstitutional); *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband violates equal protection); *Matter of Shpritzer* v. *Lang*, 17 A.D.2d 285, 289, 234 N.Y.S.2d 285, 289 (1st Dept. 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S. 2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of sex); *Wilson* v. *Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

This Court's decision in *Reed* v. *Reed*, *supra*, has heightened the debate concerning the degree of scrutiny appropriately accorded sex-based classifications. In *Reed*, the question of the stringency of review was left open because the Idaho statute there at issue "failed to satisfy even the

more lenient equal protection standard." *Eisenstadt* v. *Baird*, 405 U.S. 438, 447 n.7 (1972). Significantly, the majority below overlooked the explanation in *Eisenstadt* v. *Baird* of the approach taken in *Reed*, and instead understood *Reed* as requiring application of a "lenient" review standard in sex discrimination cases.

Some courts regard *Reed* as a major precedent marking a new direction in judicial review of sex-based classifications. *See, e.g., Moritz* v. *Commissioner of Internal Revenue, supra* (when placed under the scrutiny required by *Reed*, income tax deduction classification premised primarily on sex lacks justification); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972) (16 (boys)/18 (girls) sex-age differential for juvenile offender treatment held unconstitutional); *Cohen* v. *Chesterfield County School Board*, —— F.2d ——, 41 U.S.L.W. 2167 (4th Cir. Sept. 14, 1972); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972) (all relying on *Reed* to invalidate regulations requiring termination of employment at a fixed stage of pregnancy); *Paxman* v. *Wilkerson*, Civil No. 638-71-R (E.D. Va. Nov. 15, 1972) (all school districts in Virginia must treat pregnancy the same as any other temporary disability); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972) (involuntary discharge from the Air Force grounded solely on servicewoman's pregnancy declared unconstitutional); *Bravo* v. *Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972) (forced leave at fixed stage of pregnancy declared unconstitutional); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972)

(higher admission standard for females in Boston Latin Schools violates equal protection); *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972) (unwed mothers may not be barred from high school); *Brenden* v. *Independent School District*, 342 F. Supp. 1224 (D. Minn. 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972) (girls may not be excluded from participation in interscholastic competition on varsity teams); *Matter of Patricia A.*, 31 N.Y. 2d 83, 335 N.Y.S.2d 33 (1972) (16 (boys)/18 (girls) sex-age differential for classification of "persons in need of supervision" declared unconstitutional).

On the other hand, "lenient" review of sex-based discrimination is evident in *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3261 (U.S. Sept. 21, 1972) (No. 474); *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 41 U.S.L.W. 3220 (U.S. Oct. 24, 1972) (No. 178); *Gutierrez* v. *Laird*, 346 F. Supp. 289 (D.D.C. 1972), *appeal pending*, No. 72-1829, D.C. Cir. (all three upholding automatic termination of employment of pregnant women); *Eslinger* v. *Thomas*, 324 F. Supp. 1329 (D.S.C. 1971) (denying preliminary injunctive relief against refusal of state senate to hire female page), 340 F. Supp. 886 (D.S.C. 1972) (denying permanent injunction). Significantly, in the cases appraising *Reed* as a decision marking a new direction, the challenged classifications succumbed to judicial review; in those assigning minimal precedential value to *Reed*, including the case at bar, the classifications survived.

Some courts have even seen in *Reed* implicit rejection of a strict standard of review in cases challenging sex-based

classifications."[39] *See, e.g., Buchas* v. *Illinois High School Ass'n*, 41 U.S.L.W. 2277 (N.D. Ill. Nov. 15, 1972) ("implicit in [the *Reed*] holding is the proposition that sex is not an inherently suspect classification"). And the majority below concluded, on the basis of *Reed*, "in this case we would be remiss in applying the compelling interest test." 341 F. Supp. at 206 n.2 (J.S. at 9a). Then, in making the judgment "whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end," the court concluded that "the statute must be upheld 'if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts.' *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970)" (emphasis supplied by court below). 341 F. Supp. at 206 (J.S. at 9a).

3. Precedent in need of revaluation: "benign" classifications that provide a "place" for woman in man's world.[40]

Decisions of this Court that span a century, none of them revaluated in *Reed*, have contributed to this anomaly: pre-

---

[39] This interpretation of *Reed* is urged in a petition for certiorari now before the Court:

> . . . The decision below is in conflict with the decision of this Court in *Reed* v. *Reed*. . . .
>
> This Court [in *Reed*] did not adopt nor comment upon, although urged to do so by 'Women's Liberation' groups, the standards by which discriminations based on race are judged for Fourteenth Amendment purposes, *i.e.*, the 'strict scrutiny' test.

Petition for certiorari at 4-5, *La Fleur* v. *Cleveland Bd. of Educ.*, *supra*, petition filed Nov. 27, 1972.

[40] "For if women have only a place, clearly the rest of the world must belong to someone else and, therefore, in default of God, to men." E. Janeway, Man's World, Woman's Place: A Study in Social Mythology 7 (1971).

ostensibly well-meaning exaltation of woman's unique role as wife and mother has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society.

This Court's assessment of women's claims to full participation in society outside the home began with *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), in which the majority, in a brief, dispassionate opinion explained that neither the privileges and immunities clause of article IV, section 2 of the Constitution, nor the privileges and immunities clause of the fourteenth amendment, secured to Myra Bradwell the right to practice law.[41] In a concurring opinion Justice Bradley looked beyond the Constitution to "the law of the Creator":

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. . . .

---

[41] *Bradwell* was followed in *In re Lockwood*, 154 U.S. 116 (1894). It is now established that arbitrary denial of admission to the bar of a state violates the due process and equal protection guarantees of the fourteenth amendment. *See Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). The *Bradwell* and *Lockwood* decisions are legal deadwood and should be museum pieces. But a century after the *Bradwell* decision, equal opportunity for women in the legal profession remains unfinished business. *See* Read & Petersen, Sex Discrimination in Law School Placement, 18 Wayne L. Rev. 639 (1972).

> It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. 83 U.S. (16 Wall.) at 141.[42]

Although the method of communication between the Creator and the jurist is never disclosed, "divine ordinance" has been a dominant theme in decisions justifying laws establishing sex-based classifications. *E.g., State* v. *Heilman*, 105 Kan. 139, 146-47, 181 P. 630, 633-34 (1919); *State* v. *Bearcub*, 465 P.2d 252, 253 (Ore. Ct. App. 1970). Well past the middle of the Twentieth Century, laws delineating "a sharp line between the sexes," [43] were sanctioned on the basis of assumptions unnecessary to prove, and impossible to disprove, for their lofty inspiration was an article of faith.

In *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874), the Court ruled that the right to vote was not among the "privileges and immunities of United States citizenship," hence states were not inhibited by the Constitution from committing "that important trust to men alone." But the Court emphasized that, beyond doubt, women are "persons" and may be "citizens" within the meaning of the fourteenth amendment. The significance of this clear statement has been discounted by some commentators,[44] perhaps be-

---

[42] For a recent descendant of Justice Bradley's opinion in *Bradwell* v. *Illinois*, *see State* v. *Hunter*, 208 Ore. 282, 287-88, 300 P.2d 455, 457-58 (1956), discussed in Johnston & Knapp, *supra* at 692.

[43] *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948).

[44] *See* Hodes, Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment, 25 Rutgers L. Rev. 26 (1970).

cause the Court also pointed out that children qualify under both headings.

A landmark decision of the Court, responding to turn of the century conditions when women labored long into the night in sweatshop operations,[44] *Muller* v. *Oregon*, 208 U.S. 412 (1908), is described by some commentators today as a "roadblock to the full equality of women."[45] The issue in *Muller* was the constitutionality of an Oregon statute prohibiting the employment of women "in any mechanical establishment, or factory, or laundry" for more than ten hours per day. Muller, a laundry owner, was convicted of a violation of this statute. Three years earlier, in *Lochner* v. *New York*, 198 U.S. 45 (1905), the Court had declared unconstitutional a New York statute setting maximum hours of work at ten per day and sixty per week for all bakery employees, men as well as women. Not yet prepared to overrule *Lochner*, the Court distinguished it in an opinion reflecting the differences in the station occupied by men and women in the society of that day.

Interwoven in the *Muller* opinion are two themes: (1) recognition of the intolerable exploitation of women workers; (2) concern for the health of the sex believed to be weaker in physical structure but assigned the role of bearing the future generation ("[T]he physical well-being of

[44] For historical perspective, *see* E. Baker, Protective Labor Legislation 101, 149-277, 444-56 (1925); E. Flexner, Century of Struggle: The Women's Rights Movement in the United States 213-15 (1970 ed.).

[45] Murray, The Rights of Women, in The Rights of Americans: What They Are—What They Should Be 521, 525 (N. Dorsen ed. 1971). For criticism when the decision was generally regarded in a favorable light, *see* Crozier, Regulation of Conditions of Employment of Women: A Critique of *Muller* v. *Oregon*, 13 B.U.L. Rev. 398 (1933).

woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. at 421.) Accepting as historic fact man's domination of woman, the Court stressed that women must "rest upon and look to [man] for protection" and, somewhat inconsistently, that she requires the aid of the law "to protect her from the greed as well as the passion of man." 208 U.S. at 422.[47]

Uncritical reliance upon *Muller* for the broad proposition that sex is a valid basis for legislative classification has been persistent and still occurs,[48] although the issue in *Muller*—whether half a loaf would be allowed to state legislatures after the full loaf was denied in *Lochner*—long ago lost all vitality. *See Bunting* v. *Oregon*, 243 U.S. 426 (1917) (state may prescribe maximum hours of labor by *all* employees); *United States* v. *Darby*, 312 U.S. 100 (1941) (upholding the federal Fair Labor Standards Act and, in the process, thoroughly repudiating the reasoning responsible for the *Lochner* decision); *Mengelkoch* v. *Industrial Welfare Commission, supra.* Moreover, indicative of the changes in economic and social life in the decades since *Muller*, women workers—principally blue collar workers—have successfully challenged under Title VII laws restricting the hours women may work. As the work day shortened from twelve hours to eight, and the work week from six

[47] *Muller* was followed in several cases presented in much the same societal climate and legal setting: *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Radice* v. *New York*, 264 U.S. 292 (1924); *Bosley* v. *McLaughlin*, 236 U.S. 385 (1915); *Miller* v. *Wilson*, 236 U.S. 373 (1915); *Hawley* v. *Walker*, 232 U.S. 718 (1914); *Riley* v. *Massachusetts*, 232 U.S. 671 (1914).

[48] *See* most recently *Rinehart* v. *Westinghouse Elec. Corp.*, Civil No. 70-539 (E.D. Ohio Nov. 2, 1972) (*Reed* does not overrule *Muller*).

days to five, women found that these laws, however "protective" in origin, were "protecting" them from better-paying jobs and opportunities for promotion. *See, e.g., Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Kober* v. *Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971).

While *Muller* reflects constitutional interpretation in midpassage from *Lochner* to *Darby, Goesaert* v. *Cleary*, 335 U.S. 464 (1948), hardly exemplifies a first step toward enlightened change. It was retrogressive in its day and is intolerable a generation later. Unlike the "benign" classification upheld by the Court in *Muller*, the Michigan statute challenged in *Goesaert*, like the classification challenged here, was difficult to construe as a measure intended to assist women "in the struggle for subsistence" or to safeguard women's competitive position. The statute at issue in *Goesaert*, although it allowed women to serve as waitresses in taverns, barred them from the more lucrative job of bartender. Exception was made for the wives and daughters of male tavern owners. In contrast to the protective motive apparently present in *Muller*, the actual motivation behind the statute in *Goesaert* was said by the appellant to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467.[*] *See* E. Baker,

[*] *Cf. Truax* v. *Raich*, 239 U.S. 33, 41 (1915) (right to work without discrimination on grounds of race or nationality "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure"); *Takahashi* v. *Fish and Game Comm'n*, *supra* (invalidating on equal protection grounds denial of fishing licenses to aliens ineligible for citizenship).

Protective Labor Legislation 444-56 (1925). Yet even the outright exclusion in *Goesaert* was tendered to this Court in a "protective" wrapping. The opinion below, 74 F. Supp. 735, 739 (E.D. Mich. 1947) (three-judge court) observed that "grave social problems" could be created by female bartenders, that male owners would be motivated to maintain "a wholesome atmosphere" when a wife or daughter tends bar, hence the statute constituted a "special provision for the protection of women."

The majority opinion in *Goesaert* reflects an antiquarian male attitude toward women—man as provider, man as protector, man as guardian of female morality. While the attitude is antiquarian, it is still indulged by judges who would automatically reject attribution of inferiority to racial or religious groups. *See* Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971).

Twelve years later, the Court appeared to step away from *Goesaert*. In *United States* v. *Dege*, 364 U.S. 51 (1960), it refused to rely on "ancient doctrine" concerning the status of women. The Court declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women," and rejected precedent from an earlier age expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 52, 53.

Goesaert's sanction of "a sharp line between the sexes," however, has not been reassessed by this Court. On the contrary, the Court cited *Goesaert* with seeming approval as recently as 1970. *See Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). But enlightened jurists in federal and state courts have found *Goesaert* a burden and an embarrassment. They politely discard it as precedent, refusing "to be obfuscated by medieval views regarding the status of

women." *See Sail'er Inn, Inc.* v. *Kirby, supra; Paterson Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne, supra; Seidenberg* v. *McSorleys' Old Ale House* and *Bennett* v. *Dyer's Chop House, supra.*

This survey of pre-*Reed* precedent not squarely addressed by the Court in its *Reed* opinion appropriately ends with *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which the court again perceived a sex-based classification as "benign." In *Hoyt*, the Court sustained a Florida statute limiting jury service by women to those who registered with the court their desire to be placed on the jury list. Observing that "woman is still the center of home and family life,"[10] the Court concluded that the Florida legislature had not transgressed constitutional limitations by according her advantaged treatment: she had the right, but not the obligation to serve.

Special treatment of women as jurors was no advantage to defendant Hoyt whose crime was committed after an altercation in which she claimed her husband had insulted and humiliated her to the breaking point.[11] Nor is the classification "benign" for women generally. For example, in a 1970 decision a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a result of this exemption, women constituted less than twenty percent of the available pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Less

[10] 368 U.S. at 61-62; *cf. Leighton* v. *Goodman*, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970).

[11] Empirical studies support the hypothesis that men jurors tend to favor men, while women jurors tend to favor women. *See* Nagel & Weitzman, Women as Litigants, 23 Hastings L.J. 171, 192-97 (1971).

chivalrous than this Court, but more accurately reflecting the impact of the stereotype, the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems . . . ." *De Kosenko* v. *Brandt*, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). *See also Goldblatt* v. *Board of Education*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (regulation authorizing full salary less jury fees for male, but not female teachers was "reasonable" because a woman could avoid jury duty by claiming exemption).

In 1972, this Court declined an invitation to review the constitutionality of a Louisiana statute limiting jury service by women to volunteers. The Court observed that "nothing in past adjudications [suggests] that [the male] petitioner has been denied equal protection by the alleged exclusion of women from grand jury service." *Alexander* v. *Louisiana*, 405 U.S. 625, 633. A short time later, the Court ruled that proof that blacks had been systematically excluded from state grand and petit juries that indicted and convicted a white defendant would entitle the white defendant to federal habeas corpus relief, even if he could not show he was harmed by the exclusion. *Peters* v. *Kiff*, 407 U.S. 493 (1972). The inference might well be drawn that full participation by women in community affairs is not yet recognized as a value worthy of "protection" in the interest of society.[22] *See* Johnston & Knapp, *supra*, 46 N.Y.U.L. Rev. at 718-21.

---

[22] *Compare State* v. *Hall*, 187 So. 2d 861, 863 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) ("The legislature has the right to exclude women so they may continue their service as mothers, wives

In 1971, two legal scholars—both of them male—examined the record of the judiciary in sex discrimination cases. They concluded that the performance of American judges in this area "can be succinctly described as ranging from poor to abominable. With some notable exceptions . . . [judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as 'racist' . . . . [But] 'sexism'—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was." Johnston & Knapp, *supra*, 46 N.Y.U.L. Rev. at 676 (1971).

While a new direction has been signalled in some of the state and lower federal courts, and in this Court's opinions in *Reed*, *supra*, and *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the need for clear statement of the appropriate review standard is evident. *Amicus* urges that designation of sex

---

and homemakers and also to protect them . . . from the filth, obscenity and noxious atmosphere that so often pervades a courtroom during a jury trial."), *with Abbott* v. *Mines*, 411 F.2d 353, 356 (6th Cir. 1969) ("It is common knowledge that society no longer coddles women from the very real and sometimes brutal facts of life. Women, moreover, do not seek such oblivion.").

Despite *Hoyt*, state legislation concerning jury duty has progressed toward recognition that service is a responsibility shared equally by all citizens, male and female alike. By 1970, the majority of states (including Florida) either treated women and men on the same basis, or relieved women only when family duties in the particular case warranted exemption. *See* Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

as a suspect classification is overdue, provides the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim.

III.

The challenged classification is not justified by administrative convenience, the primary rationale relied on by the majority below.

A. *The challenged classification does not result in substantial economies.*

The majority below considered it

> clear that the reason Congress established a conclusive presumption in favor of married servicemen was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. 341 F. Supp. at 207 (J.S. at 10a).

The majority further stated:

> Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members. 341 F. Supp. at 207 (J.S. at 11a).

The assumption underlying the classification, and the defense of it offered below, is evident: nearly all women married to men in the military are financially dependent upon their husbands. Significantly, the statutes at issue de-

fine "dependent" as a person whose own income does not cover half of that person's expenses. It is not at all clear that nearly all women married to servicemen fall in this category.

In 1971, 43% of all women over the age of 16 were in the labor force, 18% of all women worked full-time the year round, and almost 60% of all married women living with their husbands were gainfully employed.[13] The historical trend has been dramatically upward and further increases in labor force participation by women are expected.[14] It is likely, then, that many married women earn enough to cover more than half of their own living expenses.[15] Such women would not qualify as "dependents" under the above criterion. Thus, it may well be that if servicemen were asked to prove the dependency of their wives, the resultant savings in benefits paid would be far greater than the cost of processing applications for benefits. Assuming vigorous enforcement, as is now the case with respect to servicewomen's applications, a high percentage of non-eligible servicemen would not bother to apply, thereby reducing the application processing burden that so impressed the majority below.

---

[13] U.S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W.B. Pub. No. 72-191 Mar. 1972).

[14] Travis, The U.S. Labor Force: Projections to 1985, 93 Monthly Labor Rev., May 1970, 3, Table 4 at 8.

[15] Note that under the statutory definition this need not mean that the wife earns more or as much as the husband. In the case at bar, for example, an income of only $2820 a year (Joseph Frontiero's) is enough to disqualify a spouse as a dependent. Many working women have substantially larger incomes. In 1970, for example, the median income for full-time women workers was $5,323. U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap 1 (rev. Dec. 1971).

But neither the armed forces nor the congressional committees involved ever have investigated whether the current arrangement does in fact effect any saving.[16] Moreover, it is unlikely that Congress would require servicemen to prove dependency of their wives even if such a requirement would result in substantial economies. As the legislative history of these statutes reveals, the dominant purpose of Congress was to provide an incentive for married persons to choose a military career by offering benefits comparable to those available in civilian employment.[17] The absence of any effort to determine whether the supposed economy of the present arrangement is real suggests that the principal reason for the distinction is not administrative convenience but the stereotypical notion that the husband, whatever his actual income, ought to be treated as principal family breadwinner.

While there is no evidence whatever supporting the economic prop for the challenged classification—that it costs less to grant benefits for wives than to require proof of dependency—it is undisputed that the relief sought by appellants, equalization of fringe benefits for married military personnel regardless of sex, would result in no increase in budget requirements of the Department of Defense.[18]

---

[16] *See* appellees' answers to appellants' interrogatories Numbers 1 and 2, Single Appendix at 43-44.

[17] *See* pp. 63-65 *infra*.

[18] *See* S. Rep. No. 92-1218, 92d Cong., 2d Sess. 2 (1972).

B. Dissimilar treatment for men and women who are similarly situated cannot be justified by characterising the benefits here at issue as a "privilege" or a "windfall."

The challenged provisions establish a blatantly discriminatory sex line: all servicemen whose wives earn more than half of their own living expenses are eligible for benefits; all servicewomen whose husbands earn more than half of their own living expenses are ineligible for benefits. The serviceman so situated cannot be denied benefits; his female counterpart cannot obtain them.

Characterization of the benefits at issue as a "privilege" does not reduce the government's obligation to distribute them with an even hand. While the government is not obliged to provide these fringe benefits, once it chooses to do so, the fifth amendment's guarantee of evenhanded application of the laws forbids arbitrary line drawing. *See Moritz* v. *Commissioner of Internal Revenue, supra* ("The concept that constitutional rights turn on whether a Governmental [*sic*] benefit is characterized as a right or a privilege has been emphatically rejected. *See Morrissey* v. *Brewer*, 408 U.S. 471, 481; *Graham* v. *Richardson*, 403 U.S. 365, 374; *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6"); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1454-57 (1968).

Nor does characterization of Lt. Frontiero's complaint as a claim for "a windfall" avoid the collision with fundamental constitutional principle. Male members of the armed forces with non-dependent wives cannot be denied the "windfall." Similarly situated female members are no less deserving.

Men and women alike are attracted to military service because it offers them occupational training, travel opportunity and security. For many young persons of both sexes, service careers provide the break they need "to escape a lifetime on the margin." [39] For the married woman, however, the economic viability of a service career is impaired in a way it is not for the married man. Denial of fringe benefits to women and automatic provision of them to men underscores for the woman in military service her second class status. This reality is not disguised by telling her that "windfalls" and "privileges" are reserved for men.

C. ***This Court and lower federal courts have rejected administrative convenience as a justification for discriminatory sex-based classifications.***

In *Reed* v. *Reed, supra,* the Court held unconstitutional a state statute providing that, as between persons equally entitled to administer an estate, "males must be preferred to females." The principal justification for the challenged provision was administrative convenience—the avoidance of a class of contests and, thereby, reduction of the probate court's workload. In rejecting this justification, Mr. Chief Justice Burger, writing for a unanimous Court, stated:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [But t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind

[39] Phillips, On Location with the WACS, Ms., Nov. 1972, 53, 55.

of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. 404 U.S. at 76.

As Judge Johnson stated in his dissent in the case at bar:

> The basic message which comes from [the *Reed* case] is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. 341 F. Supp. at 211 (J.S. at 20a).

In the case at bar, as in *Reed*, acceptance of the administrative convenience rationale would require approval of sex-role stereotyping as a legitimate basis for legislative distinction.[20] As this Court has recognized, resort to group stereotype as a basis for legislative line-drawing is wholly at odds with the principle of equality of individuals before the law. In *Stanley* v. *Illinois, supra,* decided two days before the decision by the court below but apparently not considered by that court, this Court declared unconstitutional legislation based on the administratively convenient assumption that unwed fathers are unsuitable and neglect-

---

[20] *Cf. Hoyt* v. *Florida, supra; Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972), both invoking "administrative convenience" to justify provisions alleged to discriminate invidiously on the basis of sex. *Hoyt* v. *Florida* involved a statute requiring women to come forward and volunteer if they wished to be placed on the jury list. The *Hoyt* statute might have been viewed as according women advantaged treatment, if the Court overlooked the implication for an adult person of exemption from civic responsibility. *See* pp. 41-42 *supra*. *Forbush* involved a married woman's right to retain her birth name. The lower court stressed the accessibility to plaintiff of a change of name procedure; reasoning that Ms. Forbush had a "simple, inexpensive means" of achieving her objective, the court characterized her injury as *de minimis*. For a different appraisal of the character of the interest asserted in *Forbush, see Stuart* v. *Board of Supervisors*, No. 105 (Ct. App. Md. Oct. 9, 1972).

ful parents. In *Stanley*, as in the instant case, the barrier was not "insurmountable," for under the legislation at issue there an unwed father could affirmatively prove his qualification in an adoption or guardianship proceeding. But the Court held that he should not be subjected to a standard of proof more onerous than that applicable to other parents. 405 U.S. at 658.

Most recently, the Court of Appeals for the District of Columbia[21] rejected the argument that avoidance of administrative difficulties justified denial of medical benefits to children born to unmarried members of the armed forces. In striking down this classification (included in 10 U.S.C. Section 1072, one of the sections challenged in the case at bar),[22] the court stated:

> While the Government may legitimately attempt to conserve its fisc, it may not accomplish that goal by drawing invidious classifications.

D. *Congressional equalization of benefits paid to or for the "dependents" of male and female employees of the federal government demonstrates the administrative feasibility of equal treatment and congressional concern that sex-based discrimination be ended.*

In December, 1971, Congress amended Title 5 of the United States Code "to provide equality of treatment for married women federal employees with respect to [veteran's] preference, eligible employment benefits, cost of living allowances in foreign areas, and regulations concern-

---

[21] *Miller* v. *Laird*, Civil No. 752-71 (D.D.C. Aug. 31, 1972) (three-judge court).

[22] The same distinction between children born to married parents and children born out of wedlock appears in 37 U.S.C. Section 401, the housing allowance provision challenged in the instant case.

ing marital status generally."[*] This legislation, covering all employees of the federal government except members of the uniformed services, added the following subparagraph to 5 U.S.C. Section 7152:

> (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

This provision had the following effects: (a) it equalized the dependency tests under 5 U.S.C. Section 8133 for payment of death benefits to widows and widowers of federal employees dying from injury sustained in the performance of duty. Previously, widows were entitled to benefits if they were "living with, or dependent for support on the decedent at the time of his death or living apart for reasonable cause or because of desertion." 5 U.S.C. Section 8101(6). A widower, however, was entitled to benefits only if, "because of physical or mental disability, [he] was wholly dependent for support on the employee at the time of her death." 5 U.S.C. Section 8101(11); (b) it equalized the dependency tests under 5 U.S.C. Section 8110 for payment of augmented compensation to dependents of disabled federal employees. Previously, a wife was eligible for augmented compensation if she lived in the same household as the employee or received regular contributions from him, or if he was under court order to contribute to her support. A husband was eligible for augmented compensation only if he was wholly dependent on the employee for support because of physical or mental disability.

---

[*] P.L. 92-187, 85 Stat. 644.

In January, 1971, Congress amended 5 U.S.C. Section 8341[45] which defines persons qualified for Federal Civil Service survivors' annuities. A surviving widow qualified automatically, but a surviving widower qualified only if he was incapable of self-support because of mental or physical disability and received more than half of his support from his wife. The amendment gave widowers the same automatic qualification as widows. The House Committee Report states the reason for the amendment:[46]

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

In December, 1971, Congress amended 5 U.S.C. Section 2108,[47] which defines persons eligible for veterans preference in the federal civil service. Previously, the "unmarried widow," but not the "unmarried widower," of a veteran, and "the wife," but not the husband, of "a service-connected disabled veteran" meeting certain other requirements were eligible. The amendment made widowers and husbands eligible under the same conditions as widows and wives.[48]

---

[45] P.L. 91-658, 84 Stat. 1961.

[46] H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970, U.S. Code Cong. & Ad. News, Vol. III, 5931, 5934.

[47] P.L. 92-187, 85 Stat. 644.

[48] The amendment leaves unchanged provisions granting a preference under certain circumstances to mothers but not fathers of veterans.

In the same act, Congress amended 5 U.S.C. Section 5924 which provides cost of living allowances to dependents of federal employees living in a foreign area. The allowance, previously payable to "the employee's wife or his dependents or both," was made payable to "the employee's spouse or dependents, or both."

In October of this year, Congress amended 38 U.S.C. Section 102(b) which defines the term "dependent" for the purpose of determining the amount of the education assistance allowance armed forces veterans are eligible to receive.[*] A veteran with dependents, as defined, is eligible for a substantially higher allowance.[**] Section 102(b) previously provided that the wife of a male veteran was automatically classified as a dependent while the husband of a female veteran was classified as dependent only if he "is incapable of self-maintenance and is permanently incapable of self-support due to mental or physical disability; . . ." The amendment redefines "dependent" to include all husbands of eligible female veterans without regard to incapacity, thus extending the statutory presumption of dependency as requested by *amicus* in this case.

Before amendment, the provisions noted above, like the statutes at issue in this case, imposed a test of actual dependency for husbands of female employees, but assumed the dependency and eligibility of the wives of male employees. The change in each case was to extend to husbands of female employees the automatic benefits already enjoyed by wives of male employees. The "administrative conven-

[*] P.L. 92-540, 86 Stat. 1074.

[**] 38 U.S.C. Section 1682.

ience" of prior arrangements was thus rejected as a justification for differentials in fringe benefits. Rather, the prior arrangements were recognized as "discriminatory," and inconsistent with "the facts of current-day living."

E. *Federal prohibitions of discrimination on the basis of sex by private and state employers forbid practices of the kind authorized by the statutes at issue in the case at bar.*

The Sex Discrimination Guidelines[70] issued by the Equal Employment Opportunity Commission (the "Commission") under Title VII of the Civil Rights Act of 1964, as amended,[71] are applicable to state and municipal governments or corporations and to all private employers with 15 or more employees. With regard to fringe benefits, the Guidelines provide:

> (a) "Fringe Benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
>
> • • • • •
>
> (d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. Section 1604.9

The Guidelines thus explicitly proscribe differential treatment of men and women of the kind at issue in the case at bar. Moreover, they reflect consistent administrative and

---

[70] 29 C.F.R. Sections 1604.1-1604.10.

[71] 42 U.S.C. Section 2000e-12.

judicial interpretation"[11] prior to the time the Guidelines formally issued. For example, in 1969 the Commission ruled[12] that there was reasonable cause to believe that a death benefit plan which provided an automatic pension for widows of male employees, but did not provide a pension for the widowers of female employees unless they were physically or mentally incapable of self-support was unlawful under Title VII. "Title VII of the Civil Rights Act of 1964," the Commission stated, "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." *Id.* (Emphasis in the original.)

The Equal Pay Act,[13] 29 U.S.C. Section 206(d), has also been interpreted to prohibit the kind of sex-based classification at issue here. For example, the Wage and Hour Divi-

---

[11] *See, e.g., Bartmess* v. *Drewerys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971).

[12] EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). *See* the following EEOC decisions ruling that unequal fringe benefits for men and women violate Title VII: Case No. CL7-6-694, CCH Emp. Practices Guide ¶6009 (May 19, 1969), Decision No. 70-510, CCH Emp. Practices Guide ¶6132 (Feb. 4, 1970), Decision No. 70-660, CCH Emp. Practices Guide ¶6133 (Mar. 24, 1970), and Decision No. 71-1100, CCH Emp. Practices Guide ¶6197 (Dec. 31, 1970) (all ruling unlawful employers and/or union health insurance plans providing for coverage of spouses of male but not female employees); Decision No. 70-513, CCH Emp. Practices Guide ¶6114 (Feb. 4, 1970) (payment of death benefits to surviving spouses of male but not female employees ruled unlawful); Decision No. 70-75, CCH Emp. Practices Guide ¶6049 (Aug. 13, 1969), Decision No. 71-562, CCH Emp. Practices Guide ¶6184 (Dec. 4, 1970), Decision No. 72-0702, CCH Emp. Practices Guide ¶6320 (Dec. 27, 1971) and Decision No. 72-1919, CCH Emp. Practices Guide ¶6370 (June 6, 1972) (all ruling unlawful different optional retirement ages and benefits for men and women).

[13] *See* 29 C.F.R. Sections 800.5-800.12 for the extent of coverage.

sion of the Department of Labor, which administers the Equal Pay Act, has ruled that insurance plans pursuant to which the employer pays the cost of insurance premiums for family coverage for married male employees but pays the cost of family coverage for married female employees only if they are actually the heads of their families violate the Act. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (Feb. 11, 1966)."[75]

In addition to the non-discrimination obligations imposed by Title VII and the Equal Pay Act, employers holding contracts with the federal government are required to comply with Office of Federal Contract Compliance Sex Discrimination Guidelines[76] issued pursuant to Executive Order 11246, as amended.[77] Sanctions for failure to comply include cancellation of federal contracts held by the employer.[78] The Guidelines provide:

> The employer must not make any distinction based upon sex in employment opportunities, wages, hours or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated those

---

[75] *See* W & H Opinion Letter No. 420, CCH Emp. Practices Guide ¶1208.591 (Feb. 11, 1966) (insurance plan permitting male employee to insure spouse whether or not she is working but not permitting female employee to insure spouse found unlawful); W & H Opinion Letter No. 388, CCH Emp. Practices Guide ¶1208.59 (Oct. 14, 1965) (employer paid insurance plan providing family hospitalization coverage for male but not female employees found unlawful).

[76] 41 C.F.R. Sections 60-20.1-20.6.

[77] 3 C.F.R. Section 339.

[78] 41 C.F.R. Sections 60-1.26-1.32.

guidelines if his contributions are the same for men and women or if the resulting benefits are equal. 41 C.F.R. Section 60-20.3(c).

Thus, private employers, as well as state and municipal employers are instructed by federal authority that, whatever administrative convenience may result, differentials of the kind at issue here cannot stand. The discrimination such practices work against individual female employees is wholly at odds with the national commitment to eradicate sex-based discrimination.

F. Summary and conclusion: The discrimination against women mandated by the challenged classification is neither (a) supported by a compelling state interest; (b) necessary to the accomplishment of legitimate legislative objectives; nor (c) reasonably related to a permissible legislative objective.

If, as *amicus* urges, the challenged sex-based classification is declared "suspect", this Court must consider whether a compelling state interest justifies the discriminatory practices embodied in the challenged provisions. The basic objective of the system of dependents' benefits is to attract and retain qualified personnel in the armed forces.[79] There is no evidence that Congress believed that it was serving "a compelling state interest" by treating women differently from men[80] and, as demonstrated in the discussion above,[81] none is so served.

Convenience and simplicity, while grand virtues in the administration of public affairs, do not supersede the

---

[79] *See* pp. 63-65 *infra*.

[80] *Id.*

[81] *See* pp. 44-57 *supra*.

fundamental right of individuals to the equal protection of the law. Thus, such obviously convenient measures as restricting the ballot to "two old, established parties" (*Williams* v. *Rhodes*, 393 U.S. 23 (1968)), denying welfare payments to persons with less than a year's residency in the state (*Shapiro* v. *Thompson*, 394 U.S. 618 (1969)), and denying the right to vote in state elections to persons with less than a year's residency in the state (*Dunn* v. *Blumstein*, 405 U.S. 330 (1972)), did not survive measurement against the constitutional equal protection principle.

Dunn v. *Blumstein* involved governmental interests more substantial than administrative convenience. Yet the various reasons offered by the state in that case, even in combination, were found insufficient to overcome the heavy burden required by this Court.

In that case the state of Tennessee sought to justify its one-year residency requirement on two grounds: (1) to "insure purity of ballot box—protection against fraud through colonization and inability to identify persons offered to vote, and (2) [to] afford some surety that the voter has, in fact, become a member of the community and that as such, he [or she] has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his [or her] right more intelligently." 405 U.S. at 345 (citing Appellant's Brief at 15).

The Court implied that either or both of these reasons might constitute a legitimate government objective. 405 U.S. at 343-44. And Mr. Chief Justice Burger in his dissent stated explicitly that the one year residency requirement was "reasonable." He objected to the application by the majority of the "compelling state interest" standard. 405 U.S. at 363-64.

Thus while the reasons advanced by the state in *Dunn* v. *Blumstein* might be considered "rational," this Court concluded that, even in combination, they were not "compelling." In contrast to the relatively serious reasons asserted to save the Tennessee statute in *Dunn* v. *Blumstein*, the justification advanced here—administrative convenience—falls far short of a "compelling" interest when appraised in light of the interest of the class against which the statutes discriminate—an interest in treatment as full human personalities. As this Court said in *Williams* v. *Illinois*, 399 U.S. 235, 245 (1970), "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

Thus, if sex is a "suspect classification," the federal interest in limiting application processing or, alternatively, saving benefits that would be due to women if they were accorded the same fringe benefits as men, cannot justify rank discrimination against a person, solely because she is female.[22]

If the Court concludes that sex is not a suspect classification, or determines not to reach that question, *amicus* urges application of an intermediate test. In part because of decisions of this Court,[23] women continue to receive disadvantaged treatment by the law. In answer to the compelling claim of women for recognition by the law as full human personalities, this Court, at the very least, should apply a test similar to the one delineated by Chief Justice

---

[22] *Cf. Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Although *Shapiro* applied the stringent "compelling state interest" test to a state's one-year residence requirement for welfare benefits, the Court indicated that the statutory classification would fall even under the rational basis test. *Id.* at 638.

[23] *See* pp. 34-44 *supra*.

Burger in *Bullock* v. *Carter*, 405 U.S. 134 (1972). Regulations that disadvantaged women should be "closely scrutinized" with the burden on the proponent of the discriminatory action to establish that the sex-based classification is "necessary to accomplishment of legitimate [legislative] objectives." 405 U.S. at 144. *Cf. Weber* v. *Aetna Cas. & Sur. Co., supra; Miller* v. *Laird, supra.*

Yet the discrimination embodied in 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 is so patently visible that the statute is readily assailable under the less stringent reasonable-relationship test. The exclusion of women from benefits to which similarly situated men are automatically entitled lacks the constitutionally required fair and substantial relation to a permissible legislative purpose and therefore must be held to violate the equal protection clause. *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *Gulf, Colorado & S. F. Ry.* v. *Ellis*, 165 U.S. 150, 155 (1897).

First, as shown above, it is not at all clear to what extent, if any, the challenged classification in the case at bar in fact conserves the federal fisc.[84] Second, administrative convenience has been rejected by this Court as a justification for sex-based classifications even under the rational relationship test.[85] Third, Congress and the Executive, in light of society's increasing awareness of the unfairness and waste of human resources engendered by sex-based discrimination, have prohibited state and municipal governments, nearly all private employers, and federal agencies other than the uniformed services from engaging in the discriminatory employment practice challenged in

[84] *See* pp. 44-46 *supra.*

[85] *See* pp. 48-50 *supra.*

the case at bar. These comprehensive prohibitions clearly indicate that, in the view of Congress and the Executive, equal treatment of male and female employees for fringe benefit purposes is administratively feasible and, at this stage in our nation's history, a key element of equal employment opportunity policy.

The structure and mission of the armed forces are admittedly unique. But no suggestion has been made, nor does it appear, that, with regard to the benefits at issue here, equal treatment of men and women is more difficult to achieve in the armed forces than in private and other public employment. Rather, the discrimination embodied in 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 reflects the very different legislative and judicial perspective current in 1949 and 1956 when these provisions were enacted. At that time, equal employment opportunity for women was not a matter of legislative concern, and an unbroken line of precedent from this Court indicated that legislative lines drawn on the basis of sex, however "sharp," would be tolerated by the judiciary.

In view of the significant changes in the social and legal climate that have occurred since enactment of these provisions, it should be plain that the discriminatory practice countenanced by the challenged laws is no longer constitutionally tolerable. Equal pay must be an obligation in the military as it now is in all other areas of employment. Surely, there is no rational basis for exempting the military from the requirement that similarly situated male and female employees receive the same compensation. As Judge Johnson observed in his dissent below, it is "incongruous to say that the justification for denying the benefits [to women] is that it is cheaper not to give them. . . . If

all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain." 341 F. Supp. at 210-11 (J.S. at 19a).

IV.

Upon determining that 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 as now limited violate the fifth amendment, the Court should, consistent with the dominant statutory purpose, remedy the defect by extending to female members of the armed forces the same benefits now available to similarly situated male members.

When a statutory provision denies equal protection by establishing an unconstitutional classification, a court may remedy the defect either by declaring the provision equally operative upon all persons similarly situated, or by declaring the provision inoperative as to all of them. *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). With respect to 10 U.S.C. Sections 1072 and 1076, and 37 U.S.C. Sections 401 and 403, the court below thought it would face a "Hobson-like choice" in fashioning a remedy if it determined that the sex classification did not comport with equal protection principles. Should it extend housing and medical benefits to the husbands of servicewomen, or should it require servicemen to prove actual dependency of their wives? In deciding whether the benefits should be extended, or the limitation made applicable to men, the Court must be responsive to the dominant legislative purpose. *See Moritz* v. *Commissioner of Internal Revenue, supra.*

The legislative history of the housing allowance provision, enacted in 1949,[35] and the medical benefits provision, enacted in 1956,[37] indicates that both provisions were designed to induce qualified personnel to remain in the uniformed services. In both 1949[38] and 1956[39] retention of skilled personnel presented a serious problem for the armed forces in face of the higher wages and fringe benefits offered by private industry. Congressman Kilday, the sponsor of both the housing allowance and medical benefits bills in the House, noted in support of the medical benefits bill that its purpose was to put the armed forces "on a competitive basis with business and industry" in the area of fringe benefits, so as to attract "career personnel" through reenlistment. 102 Cong. Rec. 3850 (1956). With respect to the legislation including the housing allowance, Senator Chapman, a member of the Senate Committee on Armed Services and spokesman on its behalf for the legislation, stated:

> [T]he purpose [of the bill] is to establish . . . a compensation pattern which will attract, and retain on a career basis, first-class men and women in the armed services . . . . 95 Cong. Rec. 13194 (1949).

• • • • •

[35] Act of Oct. 12, 1949, ch. 681, 63 Stat. 764.

[37] Act of June 7, 1956, ch. 374, 70 Stat. 250.

[38] S. Rep. No. 733, 81st Cong., 1st Sess., 1949 U.S. Code, Cong. & Ad. News, Vol. 2 at 2089; 95 Cong. Rec. 7662 (1949) (remarks of Congressman Kilday); 95 Cong. Rec. 13194 (1949) (remarks of Senator Chapman).

[39] Senate Comm. on Armed Services, S. Rep. No. 1878, 84th Cong., 2d Sess., 1956 U.S. Code, Cong. & Ad. News, Vol. 2, 2698, 2699; 102 Cong. Rec. 3850 *et seq.* (1956).

> [T]he outmoded pattern which the services offered in the way of career compensation [is] a major deterrent to securing adequate numbers of qualified individuals for the postwar establishment. 95 Cong. Rec. 13195 (1949).

Nowhere in the legislative history of either bill does it appear that Congress wished to provide less in the way of fringe benefits to women, because it was unconcerned with retaining or encouraging reenlistment of female military personnel. On the contrary, Senator Saltonstall, ranking minority member of the Senate Armed Services Committee, speaking in support of the medical benefits bill, made it clear that enhancing the attraction of career service was the goal with respect to women as well as men:

> This single bill is not in itself an answer to all our manpower problems, of course. It does, however, to my mind, represent a long step forward toward the attainment of our objective, namely, the completely adequate defense of the United States not alone in terms of weapons and materiel but, more important, in terms of the *men* and *women* ready, willing, and able to devote themselves without interruption of career to the building up of the Nation's security. 102 Cong. Rec. 8043 (1956) (emphasis added).

Similarly, with respect to the housing allowance bill, Congressman Kilday and others spoke of the likelihood that trained personnel would be lost if adequate benefits were not paid[39] and Congressman Price explained:

---

[39] 95 Cong. Rec. 7662 (1949).

> The United States Armed Services today are highly technical organizations geared to split-second timing and complex machinery. Each depends for efficient operation upon specially trained *men* and *women* (emphasis added). 95 Cong. Rec. 7671 (1949).

In view of the dominant congressional purpose—to increase the incentive for continued service by trained personnel—it is apparent that retention of a trained service*woman* is just as desirable and worth just as much in the way of additional benefits payments as retention of a trained serviceman. The fact that current practices call for more men than women in the armed forces has no bearing on this point. The cost of training a replacement for an individual skilled servicewoman is just as great as for an individual skilled serviceman.

The majority below thus misconceived the essential purpose of the legislation. To extend the housing and medical fringe benefits to married servicewomen, it stated, would abandon "completely the concept of dependency in fact upon which Congress intended to base the extension of benefits." 141 F. Supp. at 208 (J.S. at 12a). But in fact, extension of these fringe benefits to married servicewomen is consistent with the basic statutory objective of attracting and retaining skilled personnel. Moreover, there is nothing in the provisions at issue or their legislative histories indicating that unequal treatment of male and female members of the armed forces is a considered part of the overall statutory scheme, without which its purposes could not be accomplished. Finally, establishing equal treatment by limiting the benefits granted to wives of servicemen would significantly reduce the incentive value of these benefits for affected servicemen and thus would conflict with the primary

statutory objective. Under these circumstances, extension is the only suitable remedy.

Recently, women officers testified at hearings before the House Special Subcommittee on the Utilization of Manpower in the Military.[21] The Subcommittee Report stated, "the outstanding discrimination listed by these women officers is that part of section 401, title 37, U.S. Code, which provides . . . : 'A person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support.' . . . This results in a gross inequity for married military couples."

Each of the women officers testified that this section of the code was the greatest irritant and most discriminatory provision relating to women in the military service, . . ."[22] Thus, the statutory provisions challenged here have been and still are a significant impediment to the achievement of the express purpose of the fringe benefits authorized for married military personnel. For this reason as well, extension is the appropriate remedy.

Moreover, Congress has provided further unequivocal indications of its remedial preference. As discussed above,[23] Congress has eliminated sex-based differentials in fringe benefits available to civilian federal employees. In each case, it extended to women employees the more generous benefit provisions previously applicable only to men. Very recently, in a situation in which women received advantaged treatment, Congress extended the same advantages to men.

---

[21] H.A.S.C. No. 92-51, 92d Cong., 1st & 2d Sess. 12439 (1972).

[22] Report of the Special Subcommittee on the Utilization of Manpower in the Military of the House Committee on Armed Services, H.A.S.C. No. 92-58, 92d Cong., 2d Sess., 14661-62 (1972).

[23] *See* pp. 50-54 *supra*.

See P.L. 92-603, Oct. 30, 1972, Section 104 (men and women retiring at age 62 entitled to the same social security computation formula). In the Equal Pay Act, *supra*, Congress provided expressly that an employer shall not effect the required equalization by reducing the wage of any employee. 29 U.S.C. Section 206(d)(1). Finally, as Judge Johnson noted in his dissent, the severability clauses of Titles 10 and 37 were enacted to relieve the judiciary "of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions." 341 F. Supp. at 211 (J.S. at 20a). *See also Moritz* v. *Commissioner of Internal Revenue, supra* (income tax deduction provision allowing parent care deduction to women, widowers and divorced men must be extended to cover never married men in view of the "[legislative] purpose and the broad separability clause in the act").

In light of the dominant legislative purpose, this Court's decisions should have made the appropriate resolution evident. For example, in *Levy* v. *Louisiana*, 391 U.S. 68 (1968),[*] *rehearing denied*, 393 U.S. 898 (1968) and *Weber* v. *Aetna Cas. & Sur. Co., supra*,[**] where dependency definitions singled out a certain group for unconstitutional treatment, the Court struck the offending exclusions or limitations, thus extending to the plaintiffs the benefits accorded

---

[*] *Accord, Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968); *Schmoll* v. *Creecy*, 54 N.J. 194, 254 A.2d 525, 529-33 (1969).

[**] *Weber's* equal protection holding was followed in cases challenging under the fifth amendment Social Security benefit differentials for children born of a marriage and children born out of wedlock: *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn. 1972); *Norris* v. *Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md. 1972); *Williams* v. *Richardson*, 347 F. Supp. 544 (W.D.N.C. 1972).

the larger group similarly situated. Nor is the propriety of extension of benefits a recent judicial discovery. As succinctly stated by Mr. Justice Brandeis over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), the legislature eventually may decide to remove the benefit from all, but in the meantime, the Court must extend it to the unconstitutionally excluded class."

See also Hays v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972) (extension of premium pay to men resolves conflict between Title VII and state law applicable to women only); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959, 969 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964) (unconstitutional racially discriminatory provision pruned and remainder of statute declared effective); *Yale & Towne Mfg. Co.* v. *Travis*, 262 F. 576 (S.D. N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed*, 255 U.S. 445 (1921) (workmen's compensation benefits extended to non-residents to cure constitutional infirmity); *Gates* v. *Foley*, *supra* (constitutionally infirm one-way consortium rule cured by extending recovery right to wives rather than removing it from husbands); *Burrow* v. *Kapfhammer*, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); Note, 55 Harv. L. Rev. 1030 (1942).

" *Cf. Welsh* v. *United States*, 398 U.S. 333, 366 (1970) (Harlan, J. concurring):

> . . . there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals . . . .

With respect to the appropriate remedy, two recent decisions are directly in point: *Miller* v. *Laird, supra,* and *Moritz* v. *Commissioner of Internal Revenue, supra.* In *Miller* v. *Laird,* another differential embodied in the statutes challenged here was scrutinized and found wanting. Medical and housing benefits are authorized for a "legitimate" child, but not for a child born out of wedlock. 37 U.S.C. Section 401(2); 10 U.S.C. Section 1072(2)(E). *Miller* v. *Laird* was a class action seeking extension of medical benefits under 10 U.S.C. Section 1072 to children born out of wedlock to military personnel. The court did not hesitate to effect the necessary statutory repair. It eliminated the offending qualification—"legitimacy"—and declared plaintiff and the members of her class eligible for medical care. Defendants were permanently enjoined from refusing to register children of military personnel and from denying medical and dental care to them because of their birth status.

In *Moritz* v. *Commissioner of Internal Revenue, supra,* a never married man challenged his exclusion from a parent care deduction available to never married women. The court found the provision denying the deduction to men who have never married violative of the equal protection principle implicit in the due process clause of the fifth amendment. It then considered "whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute," *id.* at 8, and concluded, in view of the dominant congressional purpose and the separability clause in the act, that "the benefit of the deduction . . . should be extended to the taxpayer," *id.* at 9.

Similarly, in the case at bar, the limitation on housing and medical benefits for the spouses of servicewomen should be pruned so that Lt. Frontiero will receive the fringe benefits automatically granted to similarly situated men.

CONCLUSION

For the reasons stated above, the decision of the district court should be reversed, the provisions of 10 U.S.C. Sections 1072 and 1076 and 37 U.S.C. Sections 401 and 403 which deny female members of the armed forces benefits and allowances available to similarly situated male members should be declared unconstitutional and the benefits and allowances available to male members of the armed forces under these sections should be made available on the same terms to similarly situated female members.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
MARC FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

Attorneys for *amicus* gratefully acknowledge the assistance provided in the preparation of this brief by Leonard M. Kessler, third year student, Rutgers (Newark) Law School, and John Lewis, third year student, Columbia Law School.

INDEX

	Page
...n Below	1
...diction	1
...ion presented	1
...tes involved	2
...ment	2
...mary of argument	4
...ment	6
I. The challenged classification has a rational basis and is reasonably related to a proper legislative objective	6
II. The statutes in issue here neither abridge a fundamental right nor establish an inherently suspect classification	14
...usion	21

...:

Adams v. *City of Milwaukee*, 228 U.S. 572	11
Bolling v. *Sharpe*, 347 U.S. 497	7
Carrington v. *Rash*, 380 U.S. 89	10, 11, 14
Dandridge v. *Williams*, 397 U.S. 471	7, 14
Flemming v. *Nestor*, 363 U.S. 603	7, 8
Goesaert v. *Cleary*, 335 U.S. 464	15, 17
Graham v. *Richardson*, 403 U.S. 365	15
Harper v. *Virginia Board of Elections*, 383 U.S. 663	14, 16
Hoyt v. *Florida*, 368 U.S. 57	15, 19
Jefferson v. *Hackney*, 406 U.S. 535	7, 9, 12, 15
Korematsu v. *United States*, 323 U.S. 214	15, 18
Loving v. *Virginia*, 388 U.S. 1	14, 15
McGowan v. *Maryland*, 366 U.S. 420	7
McLaughlin v. *Florida*, 379 U.S. 184	15, 16, 18
Muller v. *Oregon*, 208 U.S. 412	15, 19

Cases—Continued

	Page
Oyama v. *California*, 332 U.S. 633	15
Radice v. *New York*, 264 U.S. 292	15
Reed v. *Reed*, 404 U.S. 71	5, 7, 9, 10, 15, 19
Richardson v. *Belcher*, 404 U.S. 78	7, 15
Schneider v. *Rusk*, 377 U.S. 163	7
Shapiro v. *Thompson*, 394 U.S. 618	7, 10, 11, 14
Skinner v. *Oklahoma ex rel. Williamson*, 316 U.S. 535	14
Strauder v. *West Virginia*, 100 U.S. 303	17
United States v. *Carolene Products Co.*, 304 U.S. 144	16
United States v. *St. Clair*, 291 F. Supp. 122	17
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379	15
Williams v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134	15, 19

Constitution and statutes:

United States Constitution:	
Fifth Amendment	3, 4, 6, 13, 14, 19
Fourteenth Amendment	9, 16, 17
Act of September 7, 1944, Sec. 6, 58 Stat. 730	8
Act of December 15, 1971, P.L. 92–187, 85 Stat. 644	20
Career Compensation Act, 63 Stat. 802, as amended	7
Pay Readjustment Act of 1942, Sec. 4, 56 Stat. 361	8
5 U.S.C. 2101	20
5 U.S.C. 2105	20
5 U.S.C. 7152	20
10 U.S.C. 1072	2
10 U.S.C. 1076	2
10 U.S.C. 1077	2
37 U.S.C. 101	2
37 U.S.C. 401	2, 3
37 U.S.C. 403	2
42 U.S.C. 402	8

Miscellaneous:

	Page
32 Comp. Gen. 364	3
45 Comp. Gen. 163	3
Comptroller General Decision B–161261, July 3, 1972	3
118 Cong. Rec. (daily ed.) S4612	19
Department of Defense Military Pay and Allowance Entitlements Manual, § 30242	3
Hearing on S. 2738, *et al.*, Before the Subcommittee on General Legislation of the Senate Committee on Armed Services, 92d Cong., 2d Sess	13
H. Rep. No. 779, 81st Cong., 1st Sess	7
H. Rep. No. 1805, 84th Cong., 2d Sess	8
H. Rep. No. 92–359, 92d Cong., 1st Sess	20
H. Rep. No. 92–415, 92d Cong., 1st Sess	20
H.R. 2335, 92d Cong., 1st Sess	12
H.R. 2580, 92d Cong., 1st Sess	12
H.R. 4954, 92d Cong., 1st Sess	12
H.R. 8421, 92d Cong., 1st Sess	12
H.R. 8758, 92d Cong., 1st Sess	12
S. 2738, 92d Cong., 1st Sess	12
S. Rep. No. 917, 78th Cong., 2d Sess	8
S. Rep. No. 733, 81st Cong., 1st Sess	7
S. Rep. No. 1878, 84th Cong., 2d Sess	8
S. Rep. No. 92–528, 92d Cong., 1st Sess	20
S. Rep. No. 92–689, 92d Cong., 2d Sess	19, 20
S. Rep. No. 92–1218, 92d Cong., 2d Sess	13
Statistical Abstract of the United States, 1972	9

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO AND JOSEPH FRONTIERO, APPELLANTS

v.

MELVIN R. LAIRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court is reported at 341 F. Supp. 201.

JURISDICTION

The judgment of the district court was entered on April 5, 1972. A notice of appeal was filed on April 26, 1972 (App. 22a),[1] and probable jurisdiction was noted on October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether statutes that provide automatic dependency benefits for the wife of a male member of the

[1] "App." refers to the appendix to appellants' brief.

uniformed services, while providing benefits for the husband of a female member only if he is in fact dependent on her, violate the due process clause of the Fifth Amendment.

STATUTES INVOLVED

The pertinent provisions of 37 U.S.C. 401 and 403, and 10 U.S.C. 1072 and 1076, are set forth in the appendix to appellants' brief at pp. 23a–29a.

STATEMENT

This is a direct appeal from a decision of a three-judge district court sustaining the constitutionality of certain federal statutes relating to housing and medical benefits for the dependent spouse of a member of the uniformed services.[1] Under 37 U.S.C. 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters." Under 10 U.S.C. 1076 and 1077 a member's dependents are provided medical and dental care. "Dependent" is defined by 37 U.S.C. 401 and 10 U.S.C. 1072 to include (a) the wife of any male member and (b) the husband of any female member if the husband is in fact dependent on the member for more than one-half of his support. The effect of these statutes is that a male member of the armed forces automatically obtains these benefits for his spouse, but a female member obtains them only if

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U.S.C. 101(3); 10 U.S.C. 1072(1). In this brief we occasionally interchange "uniformed services" and "armed forces."

she contributes more than one-half of her spouse's support.

Pursuant to these statutes, appellant Sharron Frontiero, a lieutenant in the United States Air Force, was denied medical and housing benefits for her husband, appellant Joseph Frontiero, on the ground that her application showed that her husband was not dependent upon her for more than one-half of his support.[3] Appellants brought this suit in the district court challenging the constitutionality of these statutes. Although conceding that Lieutenant Frontiero's husband was not dependent upon her (App. 50, 3a), appellants argued that these statutes, insofar as they require a female member to demonstrate her spouse's dependency while imposing no such burden upon a male member, unreasonably discriminate on the basis of sex, in violation of the Fifth Amendment. Appellants sought a permanent injunction against the

[3] The Department of Defense regulations (App. 30a), to which appellants advert (Br. 6), are thus not at issue in this case, because Lt. Frontiero's application was denied on the statutory ground that her husband was not dependent on her for more than one-half of his support.

The regulations (Department of Defense Military Pay and Allowance Entitlements Manual, § 30242) were designed to implement Comptroller General Decisions B–113093 (32 Comp. Gen. 364) and B–157559 (45 Comp. Gen. 163), each of which construed what is now 37 U.S.C. 401 to preclude benefits for a husband who, regardless of actual dependency, is capable of self-support. In Decision B–161261, July 3, 1972, the Comptroller General reexamined and prospectively overruled the earlier decisions, ruling that benefits are payable if the husband is in fact dependent on the female member for more than one-half of his support irrespective of his ability to support himself. The Defense Department Manual has since been amended to reflect that decision.

enforcement of these statutes and an order directing the appellees to give Lieutenant Frontiero the same housing and medical benefits for her spouse as a male would have received for his spouse.

A three-judge district court (with one judge dissenting) sustained the constitutionality of the statutes (App. 1a–21a). It held that, to the extent the specific provisions attacked classify on the basis of sex, there is a rational basis for the classification.

SUMMARY OF ARGUMENT

I

The standard for review of legislative classifications in the area of economic benefits is whether the classification is reasonably related to a proper legislative objective. Under this test the housing and medical benefits statutes here challenged do not violate the due process clause of the Fifth Amendment. The objective of the statutes is to provide benefits for dependents of members of the uniformed services. The Congress could reasonably conclude that the economical administration of the dependency benefits program would be better served by not requiring an individual examination of each claim for benefits by the nearly one and one-half million married male members of the services, in view of the likelihood that the wives of most members are in fact dependent on their husbands. By the same token, the Congress could reasonably determine that, since there are only some 4,000 married female members and since it is likely that their husbands are not dependent upon them, the purposes of the dependency benefits pro-

gram would be best served by granting benefits only to those whose husbands are in fact dependent.

This Court's recent decision in *Reed* v. *Reed*, 404 U.S. 71, striking down a state statutory preference for men as administrators of estates, is distinguishable from this case. In *Reed*, the State had sought to implement a legitimate objective—"reducing the workload on probate courts by eliminating one class of contests"—by arbitrarily preferring men over women when there was no reason to think that men would perform better than women. Here, however, the presumptions of dependency are reasonably related to the legislative purpose and to the economic realities of our society.

Appellant's contention that the statutory classifications must be struck down because they reflect a "sex stereotype" that is no longer acceptable should, we submit, be addressed to the Congress, not the courts, for the challenge concerns the wisdom, not the reasonableness, of the legislative choice. The Congress has, in fact, been considering a change in the provisions at issue in this case. In the last session, the Senate passed a bill which would accord benefits to female members on the same basis as men, but the Congress adjourned before the House could consider it.

II

Although the classifications have a rational basis and are therefore constitutional under the traditional test, appellants argue that the standard for reviewing sex classifications should be the same as that applied for race, national origin, and alienage: whether

the classification is necessary to the accomplishment of compelling governmental interests. Sex, however, does not share most of the qualities that have led to the rigid scrutiny of classifications based on race, nationality, or alienage. Sex classifications do not have the especially disfavored constitutional status of race classifications; they do not affect a "discrete and insular" minority which has been excluded from the political process; they neither stigmatize nor imply a legislative judgment of female inferiority; and they are not, like race or nationality, presumptively arbitrary.

Sex classifications are, therefore, not "inherently suspect" under the Fifth Amendment. If, as appellants urge, they are frequently unwise as a matter of national policy, then the proper remedy is by legislation or constitutional amendment, rather than by abrupt judicial departure from familiar constitutional principles. We accordingly think it significant that, apart from the recent legislative activity with respect to the statutes in issue here, the Congress has approved, and 22 states have ratified, the Equal Rights Amendment to the Constitution.

ARGUMENT

I

THE CHALLENGED CLASSIFICATION HAS A RATIONAL BASIS AND IS REASONABLY RELATED TO A PROPER LEGISLATIVE OBJECTIVE

1. While the Fifth Amendment has no equal protection clause, it forbids discrimination that is "so

unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Shapiro* v. *Thompson*, 394 U.S. 618, 642. In statutes dealing with economic benefits, a legislative classification must be upheld "'if any state of facts reasonably may be conceived to justify it'." *Dandridge* v. *Williams*, 397 U.S. 471, 485; see also *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Jefferson* v. *Hackney*, 406 U.S. 535, 546; *McGowan* v. *Maryland*, 366 U.S. 420, 426. Such a classification is constitutionally infirm only if it is "patently arbitrary" and bears no rational relationship to the objective sought to be advanced by the statute. *Flemming* v. *Nestor*, 363 U.S. 603, 611; *Reed* v. *Reed*, 404 U.S. 71, 76.

Under these criteria, the statutes involved here are constitutional. As the court below stated (App. 11a), the legislative objective of the dependents' living allowance and medical benefits provisions is to reimburse members for the expense of furnishing shelter to their dependents and to provide free medical care for their dependents. The challenged classification reasonably implements these goals and the legitimate interest of Congress in the effective administration of the dependency benefits program.

The legislative history of the statutes sheds little light on the reasons for the different treatment of male and female members of the service.[4] The legis-

[4] The housing provisions were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H. Rep. No. 779, 81st Cong., 1st Sess.; S. Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in sub-

lative plan, which extends automatic dependency benefits only to male members of the service, obviously reflects the congressional judgment that most wives are dependent upon their husbands. In view of the large number of married male members of the armed forces[5] and the likelihood that most of their wives are dependent upon them, Congress could properly determine that it would be an unnecessary burden on

---

stance the dependency definitions of Section 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by Section 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S. Rep. No. 917, 78th Cong., 2d Sess., p. 4.

The medical benefits legislation, enacted as the Dependents' Medical Care Act of 1956, was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H. Rep. No. 1805, 84th Cong., 2d Sess.; S. Rep. No. 1878, 84th Cong., 2d Sess.

Similar distinctions reflecting the economic realities in this country are found in other federal legislation. For example, old age and survivors insurance benefits under the Social Security Act are made available to husbands and widowers if they were in fact receiving one-half of their support from their wives, while wives and widows are entitled to benefits without regard to whether they were receiving one-half of their support from their husbands. Compare 42 U.S.C. 402(c)(1)(C) and (f)(1)(D), with 42 U.S.C. 402(b)(1) and (e)(1).

Moreover, in considering whether a federal statutory classification is rationally based, "it is, of course, constitutionally irrelevant whether [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * *." *Flemming* v. *Nestor*, 363 U.S. 603, 612.

[5] There were as of December 31, 1970, more than 1.4 million married male members of the Army, Navy, Air Force, and Marine Corps (App. 57).

the dependency benefits program to require that each application for benefits be examined and investigated. It was therefore justified in concluding that the statutory objectives would best be served by granting benefits to all married male personnel, notwithstanding that a small proportion of servicemen whose wives are not dependent would receive a windfall in the form of unneeded benefits. Cf. *Jefferson* v. *Hackney*, 406 U.S. 535, 549.

In the case of female married members of the uniformed services, it was not unreasonable for Congress to have concluded that most of their husbands are not dependent [6] and that the federal interest in economical administration of the program would therefore be promoted by examining individually the much smaller number of claims involved.[7] Thus, while female members whose husbands are in fact dependent on them are entitled to benefits, the relatively large percentage whose husbands are not dependent receive no windfall.

2. It is the reasonableness of the classification that distinguishes this case from *Reed* v. *Reed, supra,* upon which appellants rely. In *Reed,* this Court struck down, as violative of the Fourteenth Amendment's

[6] While we have no statistics showing the percentage of service husbands who are dependent on their wives, Bureau of the Census figures for the nation's population suggest that in the large majority of families the husband is employed. In 1971, for example, 97.7 percent of married men between the ages of 25 and 44, whose wives were present, were in the civilian labor force. Statistical Abstract of the United States, 1972, p. 218, Table No. 343.

[7] There were as of December 31, 1970, 4,153 married female members of the Army, Navy, Air Force, and Marine Corps (App. 57).

equal protection clause, Idaho's statutory preference for men as administrators of estates. The State sought to justify the preference on the ground that the time and effort involved in selecting administrators could be reduced by eliminating the need to consider women for the position. The Court recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy" (404 U.S. at 76). It held however, that the means chosen to achieve that objective were arbitrary. Since men and women are equally capable of performing the duties of an administrator, the statute sought to reduce administrative costs by establishing a classification without a rational basis.

Here, by contrast, the classification chosen by Congress to achieve administrative economies is based upon reasonable presumptions of dependency, which are in accord with the realities of American life. The statute therefore does not infringe the Fifth Amendment rights of female members of the armed forces, and *Reed* does not require that it be declared unconstitutional.

3. Appellants appear to argue (Br. 53–56) that the statutory objective of economic administration of the dependency benefits program is not of sufficient importance to justify the different treatment of male and female members of the services. Appellants rely principally upon *Carrington* v. *Rash,* 380 U.S. 89, and *Shapiro* v. *Thompson,* 394 U.S. 618.

But those decisions do not suggest that the Constitution forbids Congress to legislate in order to achieve

the effective administration of governmental affairs. See *Adams* v. *City of Milwaukee*, 228 U.S. 572. To the contrary, they stand for the proposition that administrative considerations may provide a constitutional basis for legislation except in those limited circumstances where the statute impinges upon fundamental rights, or establishes an "inherently suspect" classification. Thus, the cases relied upon by appellants involved the fundamental rights of voting (*Carrington* v. *Rash, supra*) and of travel (*Shapiro* v. *Thompson, supra*)—in stark contrast to the claim here for payment of an unneeded dependency allowance. As we show below (pp. 14–19), the rights here at issue do not qualify as fundamental and we deny that sex classifications must be treated as inherently suspect.

Appellants contend also (Br. 47–53) that the presumptions of dependency upon which the statutory classification rests are contrary to fact and therefore cannot justify the different treatment of male and female members. The argument seems to be that, because the median income of males (including those unmarried as well as married) in the armed forces is lower than that for *working* women in the general population, it is somehow unreasonable to presume that most service wives are in fact dependent on their husbands. Appellants' statistics do not undercut the apparent congressional judgment that, despite occasional exceptions where the wife of a serviceman has an independent source of income or where the husband of a servicewoman has little or no income, in

most service families the husband is the breadwinner. Cf. *Jefferson* v. *Hackney*, 406 U.S. 435, 548.

Appellants urge, however, that "the true basis for this discriminatory legislation can be traced to a sex stereotype which predominated in the heyday of the common law" (Br. 59). They argue that this stereotype of the "homebound" woman "simply does not conform to our present societal structure" and that this "mold-covered doctrine and lifestyle cannot provide a rational basis for today's sex classification" (Br. 60, 62–63). What this amounts to is an argument that time has eroded the foundation of the congressional judgment and that reexamination is called for.

We have no quarrel with the view that there have been social changes since the time the legislation in issue here was enacted. That argument, though, is appropriately addressed to the Congress, not to the Court, for when the wisdom rather than the rationality of a congressional judgment is questioned it is the political rather than the judicial process that should be invoked.

In fact, the political process has been invoked with respect to the statutes here in issue. Bills to amend Titles 10 and 37 to provide dependency benefits to female members on the same basis as male members were introduced in both the House and the Senate in the last session of Congress.[8] In response to requests from the respective Armed Services Committees, the

[8] The House bills were H.R. 2335, 2580, 4954, 8421, and 8758. The Senate bill was S. 2738.

Department of Defense commented that "the proposed changes would equalize the treatment of military personnel regardless of sex and accordingly the Department of Defense favors enactment * * *. In view of the limited number of female personnel in the military service, the proposed legislation would not have a major impact on the Department of Defense." S. Rep. No. 92–1218, 92d Cong., 2d Sess., p. 5. See, also, Hearing on S. 2738, *et al.*, Before the Subcommittee on General Legislation of the Senate Committee on Armed Services, 92d Cong., 2d Sess., pp. 12, 24–25, 31–33. The Senate passed its bill on September 27, 1972, but the Congress adjourned before it was considered by the House. The Defense Department anticipates that similar or identical legislation will be introduced in the 93d Congress.

The Defense Department thus now believes that the statutory classification at issue need not be continued and that women members should be given dependency benefits on the same basis as men. The Congress may well reach the same conclusion. But this does not establish that the judgment reflected in the statute was or is irrational and unrelated to a proper legislative objective. It is to say only that the legislature may be moving toward a revision of its original judgment, perhaps in response to the sociological changes to which appellants point. These changes in the legislative climate, however, provide no basis for concluding that the existing statute is inconsistent with the due process clause of the Fifth Amendment.

II

THE STATUTES IN ISSUE HERE NEITHER ABRIDGE A FUNDAMENTAL RIGHT NOR ESTABLISH AN INHERENTLY SUSPECT CLASSIFICATION

As the foregoing discussion demonstrates, the classification here bears a reasonable relationship to the objectives of the legislation. Under traditional equal protection principles, therefore, the statutes do not offend the Fifth Amendment's due process clause. Appellants argue, however, that legislative classifications relating in any way to sex—with the exception of those which are "protective," "remedial," or "neutral"—can be sustained only if necessary to the accomplishment of compelling governmental interests (Br. 29–33).

This strict standard of review, however, has been limited to classifications that either affect sensitive and fundamental personal rights or are inherently suspect. We do not understand appellants to argue that the interests here at issue—which are wholly economic—qualify as fundamental rights.* This Court has held that when, as here, the government operates in the area of economics and social welfare, legislative classifications must be sustained if they have a reasonable basis, even though they be "imperfect" or may in practice result in some inequality. *Dandridge* v.

* Among the interests that have been identified as fundamental are voting (*Carrington* v. *Rash*, 380 U.S. 89; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663); procreation (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541); interstate travel (*Shapiro* v. *Thompson*, 394 U.S. 618); and marriage (*Loving* v. *Virginia*, 388 U.S. 1).

Williams, 397 U.S. 471, 484, 485; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Jefferson* v. *Hackney*, 406 U.S. 535, 546.

Appellants do contend that sex—like race,[10] national origin,[11] and alienage [12]—must be viewed as a "suspect" basis for classification and therefore must satisfy the stricter "compelling interest" test. This Court, however, has never treated classifications based on sex as inherently suspect,[13] and we do not think appellants have borne their heavy burden of showing that it has become necessary to review sex classifications under the compelling interest standard.

It is true that sex, like race and national origin, is a visible and immutable biological characteristic that bears no necessary relation to ability. But sex does not

---

[10] *E.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 191–192; *Loving* v. *Virginia*, 388 U.S. 1, 9.

[11] See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214, 216; *Oyama* v. *California*, 332 U.S. 633, 646.

[12] *Graham* v. *Richardson*, 403 U.S. 365, 371–372.

[13] See, *e.g.*, *Muller* v. *Oregon*, 208 U.S. 412 (upholding statute that limited women's working hours); *Radice* v. *New York*, 264 U.S. 292 (upholding statute forbidding night work by women in restaurants); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding statute that relieved women of jury duty unless they volunteered); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (permitting state university to provide separate housing for male and female students). See also *Reed* v. *Reed*, *supra*, where this Court stated the applicable test in traditional terms: "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced" (404 U.S. at 76).

share most of the other qualities that have led the Court to give rigid scrutiny to legislative classifications based on race, nationality, or alienage. First, racial distinctions, unlike sex distinctions, have an especially disfavored status in constitutional history; they "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida,* 379 U.S. 184, 192. It is this "strong policy [that] renders racial classifications 'constitutionally suspect'" (*ibid.*). See, also, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 682, n. 3 (Harlan, J., dissenting).

Suspect classifications have, moreover, invariably affected disadvantaged minorities, which, because of their minority status, have been especially vulnerable to the attempts of more powerful—and often hostile—political forces seeking to deprive them of equal rights. "[P]rejudice against discrete and insular minorities" thus calls for a more searching judicial inquiry because of the likely unresponsiveness of "those political processes ordinarily to be relied upon to protect minorities * * *." See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152–153, n. 4. Women, of course, are a numerical majority in this country and surely are not disabled from exerting their substantial and growing political influence. Even the female members of the uniformed services, though only a small minority, are not "discrete" in the sense that ethnic minorities are discrete, and are plainly not "insular." Nor is there any

indication that the political process has excluded or ignored them. Indeed, if the recent bills to amend the dependency benefits statutes (see pp. 12–13, *supra*) are any indication, this minority has a potent political voice.

Nor is legislation affecting women, like that affecting racial or ethnic minorities, commonly perceived as implying a stigma of inferiority or a badge of opprobrium which suggests that the affected class lacks equal dignity. In *Strauder* v. *West Virginia*, 100 U.S. 303, 308, this Court held that a state statute precluding blacks from serving on juries "is practically a brand upon them, * * * an assertion of their inferiority, and a stimulant to * * * race prejudice * * *." The Fourteenth Amendment, the Court stated, prohibits "legal discriminations, implying inferiority in civil society." It is, we submit, for similar reasons that classifications based on nationality and alienage, as well as those based on race, are subjected to close scrutiny.

Classifications based on sex, however, do not express an implied legislative judgment of female inferiority. Sex classifications are commonly founded upon physiological and sociological differences, and not on social contempt for women. Statutes which, for example, limit the employment of women as bartenders (see *Goesaert* v. *Cleary*, 335 U.S. 464), or exempt women from the draft (see *United States* v. *St. Clair*, 291 F. Supp. 122 (S.D. N.Y.)), bear no connotation of female inferiority, but rather are properly regarded as based upon objective differences between the sexes.

Thus, sex classifications are no more likely to stigmatize than legislation affecting any other identifiable group, such as the elderly, veterans, or the unemployed.

The decisions of this Court suggest also that a legislative classification is inherently suspect only when it is, in effect, presumptively arbitrary. Thus, legislation imposing an unequal burden upon ethnic groups or racial minorities is immediately suspect because racial and ethnic characteristics are, except in the most extraordinary circumstances,[14] irrelevant to any proper legislative purpose.[15] Accordingly, a classification drawn in these terms fairly raises a presumption that the object sought to be attained by the statutory distinction is constitutionally impermissible, or that the means chosen are unrelated to a legitimate objective.

Such a presumption of invalidity, however, is inappropriate in the case of classifications based upon sex, for that characteristic frequently bears a reasonable relation to a legitimate governmental purpose. This Court has sustained legislative classifications predicated upon the sociological or physiological differences between the sexes, when these differences are relevant to such purpose. Thus, the Court has upheld statutes permitting a state university to pro-

[14] Where, for instance, grave issues of national security are concerned. *Korematsu* v. *United States*, 323 U.S. 214.

[15] As Mr. Justice Stewart observed, when speaking of racial classification, "* * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin* v. *Florida*, 379 U.S. 184, 198 (concurring opinion).

vide separate branches for male and female students (*Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.)); relieving women of jury duty unless they volunteered, thereby permitting women to determine whether jury service would be consistent with their family responsibilities (*Hoyt* v. *Florida*, 368 U.S. 57); and limiting working hours of women on the basis of medical evidence of the injurious effect of long working hours upon a woman's constitution (*Muller* v. *Oregon*, 208 U.S. 412). By the same token, where sex differences are manifestly irrelevant to the particular objective sought to be attained by the legislature, this Court has found the classification constitutionally invalid. See *Reed* v. *Reed*, *supra*.

We therefore submit that the Fifth Amendment does not require application of the compelling interest test to sex classifications. It may be, apart from the requirements of due process, that as a matter of national policy legislative classifications based on sex should be discouraged or even made impermissible except in special situations. The Equal Rights Amendment to the Constitution, which may have such an effect, was approved by Congress on March 22, 1972, (118 Cong. Rec. (daily ed.) S4612), and has already been ratified by 22 of the required 38 state legislatures.[16]

[16] The Amendment provides (S. Rep. No. 92–689, 92d Cong., 2d Sess., p. 2):

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC. 3. This amendment shall take effect two years after the date of ratification.

That proposed Amendment has substantial legislative history that will, if it is adopted, aid in applying it to the innumerable state and federal statutes which establish sex classifications.[17] Both Houses of Congress gave careful consideration to the impact of the Amendment (see H. Rep. No. 92–359, 92d Cong., 1st Sess., pp. 2–4; S. Rep. No. 92–689, 92d Cong., 2d Sess., pp. 6–18), and there is extensive legislative history relating to similar proposals in prior sessions of Congress (see *id.*, pp. 4–5).

If the elimination of classifications based on sex which appellants seek is a desirable social objective, the appropriate method to accomplish it is by constitutional amendment or legislation[18] and not by abrupt judicial departure from long-applied constitutional principles. The former means would largely obviate the uncertainty that inevitably follows upon the formulation of new constitutional standards; it would provide the legislatures and the courts with a solid foundation for understanding the effect of the change.

---

[17] A recent government computer search revealed that 876 sections in the United States Code alone contain sex-based references (such as man, woman, widow, mother, wife, etc.).

[18] See, for example, Public Law 92–187, 85 Stat. 644, approved December 15, 1971, which amends 5 U.S.C. 7152 to provide that benefits granted by law or regulation to male federal civilian employees or their families shall be accorded on the same basis to female employees and their families. While these provisions do not cover members of the uniformed services (see 5 U.S.C. 2101(1) and 2105), they do suggest that Congress is not unresponsive to the need for broad remedial legislation to provide equal treatment for married women employees of the federal government. See H. Rep. No. 92–415, 92d Cong., 1st Sess.; S. Rep. No. 92–528, 92d Cong., 1st Sess.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
WALTER H. FLEISCHER,
ROBERT S. GREENSPAN,
Attorneys.

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1973

(3)

JAN 12 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOINT REPLY BRIEF OF APPELLANTS AND AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
MARC FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

JOSEPH J. LEVIN, JR.
MORRIS S. DEES, JR.
Southern Poverty Law Center
125 Washington Avenue
Montgomery, Alabama
Attorneys for Appellants

INDEX

PAGE

A. The quality of genuine rationality review has been misconceived by appellees 1

B. Legislative judgments about social roles solely on the basis of sex invoke a suspect criterion 6

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972) 8

Goesaert v. Cleary, 335 U.S. 464 (1948) 10
Graham v. Richardson, 403 U.S. 365 (1971) 8

Hernandez v. Texas, 347 U.S. 475 (1954) 8
Hoyt v. Florida, 368 U.S. 57 (1961) 10

Moritz v. Commissioner, —— F.2d ——, 41 U.S.L.W. 2293 (10th Cir., Nov. 22, 1972) 5
Muller v. Oregon, 208 U.S. 412 (1908) 10

Reed v. Reed, 404 U.S. 71 (1971) 3, 4, 5

Shapiro v. Thompson, 394 U.S. 618 (1969) 4
Stanley v. Illinois, 405 U.S. 645 (1972) 3

Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971) 10
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 2

PAGE

Constitutional Provisions:

United States Constitution
Fifth Amendment 6
Fourteenth Amendment 6

Other Authorities:

Amundsen, The Silenced Majority: Women and American Democracy (1971) 8, 12
Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal*, 28 J. Social Issues 59 (1972) 11
Davids, New Family Norms, 8 Trial 14 (1972) 3
Dinitz, Dynes & Clarke, *Preference for Male or Female Children: Traditional or Affectional*, 16 Marriage & Family Living 128 (1954) 11
Epstein, Women and Professional Careers: The Case of the Woman Lawyer 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University) 13
Fernberger, *Persistence of Stereotypes Concerning Sex Differences*, 43 J. Abnormal & Social Psychology 97 (1948) 11
Flexner, *Century of Struggle* (1959) 8
Freund, *The Equal Rights Amendment Is Not the Way*, 6 Harv. Civ. Rts. Civ. Libs. L. Rev. 234 (1971) 6
Glancy, Women in Law: The Dependable Ones, 21 Harv. Law School Bulletin 22 (June 1970) 12
Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) 2, 6
Hacker, Women as a Minority Group, Social Forces, no. 3 (1951) 8

PAGE

Horner, *Toward an Understanding of Achievement-Related Conflicts in Women*, 28 J. Social Issues 157 (1972) 12

Horner, Why Women Fail, Psychology Today, November 1969 12

Hoyle, Who Shall Be Principal, A Man or a Woman? The National Elementary School Principal 23 (January 1969) 8

Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971) 11

Kanowitz, Women and the Law: The Unfinished Revolution 40 (1969) 5

Kitay, *A Comparison of the Sexes in Their Attitudes and Beliefs on Women*, 34 Sociometry 399 (1940) 11

Lynn, *A Note on Sex Differences in the Development of Masculine and Feminine Identification*, 66 Psychological Rev. 126 (1959) 11

McKee & Sherriffs, *Men's and Women's Beliefs, Ideas, and Self-Concepts*, 64 Am. J. Sociology 356 (1959) 11

McKee & Sherriffs, *The Differential Evaluation of Males and Females*, 25 J. Personality 356 (1957) 11

Montagu, The Natural Superiority of Women (rev. ed. 1968) 10

Phillips, On Location with the WACS, Ms. Mag. 53 (Nov. 1972) 13

President's Commission on the Status of Women, *American Women* 44 (1963) 7

Pressman, Federal Remedial Sanctions: Focus on Title VII, 5 Valp. L. Rev. 374 (1971) 8

PAGE

Rosenkrantz, Vogel, Bee, Broverman & Broverman, *Sex-Role Stereotypes and Self-Concepts in College Students*, 32 J. Consulting & Clinical Psychology 287 (1968) 11-12

Rossi, Inequality Between the Sexes, in R. J. Lifton ed., The Women in America 106 (1964) 8

San Francisco Chronicle, July 26, 1970, Magazine section, p. 7 9

Schiller, The Widening Sex Gap, Library Journal 1097 (March 15, 1969) 9

Sherriffs & Jarrett, *Sex Difference in Attitudes About Sex Differences*, 35 J. Psychology 161 (1953) 12

Sherriffs & McKee, *Qualitative Aspects of Beliefs About Men and Women*, 25 J. Personality 451 (1957) 12

Smith, *Age and Sex Differences in Children's Opinions Concerning Sex Differences*, 54 J. Genetic Psychology 17 (1939) 12

United Nations Declaration on Elimination of Discrimination Against Women, adopted by the General Assembly on November 7, 1967, art. 10 3

Up from the Pedestal (A. S. Kraditor ed. 1968) 8

U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap (rev. ed. Dec. 1971) 8

White, Jr., *Educating Our Daughters* (1950) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

—v.—

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOINT REPLY BRIEF OF APPELLANTS AND AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

A.

The quality of genuine rationality review has been misconceived by appellees.

1. Asserting that the statutory exclusions here at issue, because they exclude women from "economic benefits," must be upheld "if any state of facts reasonably may be conceived

to justify [them]" (Br. Appellees 7), appellees look to this Court for minimal judicial scrutiny and seek to avoid more vigorous rationality review. Observing that "legislative history sheds little light on the reasons for the different treatment of male and female members of the service" (Br. Appellees 7), appellees invite the Court to speculate with them upon a possible rational basis for withholding from servicewomen fringe benefits accorded similarly situated servicemen. The minimal review urged by appellees finds support in decisions of this Court conspicuous during a period in which "property" interests were relegated to a hands-off area. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), and the enlightening discussion in Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 37-41 (1972). However, reformulation developed most notably during the 1971 term points decidedly toward more genuine judicial inquiry into the rational basis of legislative classifications. As Professor Gunther points out in his scholarly analysis, this Court appropriately regards the equal protection principle as a constitutional safeguard "with considerable bite." *Id.* at 12. Reasonableness is to be gauged on the basis of materials offered to the Court by the defenders of discrimination; it is not to be founded upon data hypothesized by the Court (or by appellees). *Id.* at 21, 47.

Appellees concede the obscurity of evidence of legislative purpose in excluding married servicewomen from fringe benefits granted married servicemen, but hypothesize an "obvious" or "apparent" congressional judgment: the husband is the breadwinner; the wife is dependent. (Br. Appellees 8, 11-12.) Concededly, no empirical inquiry informed the supposed judgment that "exceptions where the wife of

a serviceman has an independent source of income" are only "occasional." (Br. Appellees 11.)[1] Rather, the "judgment" parallels the one attributed to the Idaho legislature in *Reed v. Reed:*

> The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women. . . . While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970).

Both "judgments" derive from the same stereotype: breadwinning and the experience it brings are part of man's world; dependency and shelter from worldly experience are characteristic of woman's place. The "presumptions of dependency" hypothesized by appellees are no more "reasonable," no more "in accord with the realities of American life" (Br. Appellees 10), than were the presumptions as to spheres of experience of men and women proffered in *Reed*.[2] This Court swiftly rejected the hypothesized "ra-

---

[1] For fact dispelling the myth that income earning wives are only "occasional," *see* Br. Amicus Curiae 24-27. *Cf.* Davids, New Family Norms, 8 Trial 14 (1972): "The premises [he works . . . she stays at home] may be less and less true, but until very recently, they were not challenged as an image of the 'typical' marriage and a definition of its 'normal' form. More and more people are realizing that these premises are not true, and perhaps not worth making true after the fact."

[2] The asserted "dependency presumptions" are far less "rational," far less firmly rooted in "the realities of life," than the presumption overturned by this Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). *Cf.* United Nations Declaration on Elimination of Discrimination Against Women, adopted by the General Assembly on November 7, 1967, article 10 (declaring as fundamental the right of women to receive family allowances on equal terms with men).

tional basis" in *Reed*. 404 U.S. 71 (1971). Similarly, any meaningful judicial inquiry must result in rejection of the rationality of the legislative exclusion in the instant case.

2. Startling to any attentive reader of this Court's opinions in *Reed* and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), appellees assert that absent a "fundamental right" or a classification declared "inherently suspect," "administrative considerations" suffice to justify discriminatory classifications. In *Reed*, no "fundamental right" was at stake, and the sex-as-a-suspect-classification issue was not reached. This Court found "some legitimacy" in the "administrative considerations" urged in support of the legislation. Nonetheless, the Court concluded that the means adopted, differential treatment of the sexes based on assumptions about the qualifications of most men and most women, failed to survive scrutiny under the rationality formula. As to *Shapiro* v. *Thompson*, appellees simply ignore the Court's assertion that the challenged provision did not even meet minimum scrutiny standards. 394 U.S. at 638.

3. Equally startling in light of *Reed* is the suggestion that congressional movement toward equalizing fringe benefits for married military personnel, regardless of sex, counsels more deferential review. (Br. Appellees 12-13, 20.) The question before this Court is of course the constitutionality, not the "wisdom" of the challenged statutes. But the quality of the Court's review is not determined by the presence or absence of stirrings in Congress. In contrast to the statutes at issue in the instant case, which have not been amended to equalize the treatment of men and women, the provision challenged in *Reed* had been eliminated by the Idaho legislature, apparently without retrospective effect,

several months before this Court's decision. 404 U.S. at 74-75 n.4. *See also Moritz* v. *Commissioner*, —— F.2d ——, 41 U.S.L.W. 2293 (10th Cir., Nov. 22, 1972) (provision of Internal Revenue Code held to deny equal protection to never-married men had been prospectively eliminated by Congress eleven months prior to Court of Appeals decision).

Nor have appellees perceived the significance of *Reed* to the relevance of "sociological changes" and "changes in the legislative climate." (Br. Appellees 12, 13.) The Idaho provision challenged in *Reed* was originally enacted in 1864, a time when most adult women still labored under legal restrictions imposed on the female member of a marital unit. *See* L. Kanowitz, Women and the Law: The Unfinished Revolution 40-69 (1969). A legislature blind to the basic inequity of denying full contract and property rights to married women might well find it reasonable to prefer males for appointments that frequently require the consummation of commercial transactions. What appeared reasonable to men of the law in earlier years was declared by a unanimous Court unreasonable in 1971. For "time ha[d] eroded the foundation of the [legislative] judgment" (Br. Appellees 12), and this Court recognized that reexamination was its responsibility.

In sum, appellees' strained effort to supply a rational basis for the challenged statutes, "reasonably related to a proper legislative objective," cannot survive genuine rationality review. Neither the stereotypical description of breadwinning men and dependent women, nor the asserted leeway for "administrative considerations" can, consistent with *Reed*, impart rationality to the differential treatment of similarly situated men and women. And it is far too late

in the day to suggest that vigorous constitutional review of an existing controversy can be avoided or blunted on the speculation that change for the future may be forthcoming from the legislature.

B.

Legislative judgments about social roles solely on the basis of sex invoke a suspect criterion.

1. This Court has never to date recognized sex as a "suspect" criterion for legislative distinctions[3] and, according to appellees, it never should. Restrained review is advocated unless and until the Equal Rights Amendment is ratified, in which event, appellees indicate, an abrupt change from minimal to strictest scrutiny may well be warranted. (Br. Appellees 19-20.) It is doubtful that Congress envisioned the abrupt change suggested by appellees. Principal proponents of the Amendment in the House and Senate believed that appropriate interpretation of the fifth and fourteenth amendments by this Court would secure to men and women equal treatment under the law. *See* Br. Amicus Curiae 19-20. Even those who counseled against the Amendment anticipated that "a few significant decisions of the Supreme Court in well-chosen cases under the fourteenth amendment would have a highly salutary effect." Freund, *The Equal Rights Amendment Is Not the Way*, 6 Harv. Civ. Rts. Civ. Libs. L. Rev. 234, 242 (1971).

---

[3] It has been suggested, however, that the Court may be moving in that direction:

> It is difficult to understand [the *Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means from the [suspect classification] area can the result be made entirely persuasive. Gunther, *supra*, 86 Harv. L. Rev. at 34.

In urging declaration of the sex criterion as suspect in the instant case, appellants merely reiterate what was plain to those who, a decade ago, adverted to the pervasive social, economic and political effects of sex discrimination in American society: "Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land." President's Commission on the Status of Women, *American Women* 44-45 (1963) (statement indicating expectation that this Court would provide "imperative" clarification to remove "ambiguities with respect to the constitutional protection of women's rights").

2. Appellees concede that a prime ingredient eliciting strict scrutiny is inherent in the sex criterion: "sex, like race and national origin,* is a visible and immutable biological characteristic that bears no necessary relation to ability." (Br. Appellees 15.) On the other hand, appellees note that "racial distinctions, unlike sex distinctions, have an especially disfavored status in constitutional history." (Br. Appellees 16.) This proposition is beyond debate. The paramount concern of Congress in the period during which the post-Civil War Amendments were adopted surely did not relate to women, but neither did it relate to newcomers to our shores. Yet the principle of equal protection, from the start, reflected the fundamental notion that legislative distinctions should not be made on the basis of characteristics that bear no necessary relationship to ability and over which persons have no control. In

*While sex, like race, is a most visible and immutable biological characteristic, national origin, a "suspect" category, fits less comfortably within the definition.

accordance with this notion, in 1971 this Court formally enshrined alienage among the suspect categories. *Graham* v. *Richardson*, 403 U.S. 365 (1971).[5]

3. Appellees urge, however, that although the sex criterion "bears no necessary relationship to ability," it cannot rank as suspect because women constitute a numerical majority that has not been excluded from the political process. Skipped over is the fact that through most of our nation's history, total political silence was imposed on this numerical majority. *See* E. Flexner, *Century of Struggle* (1959); *Up from the Pedestal* (A. S. Kraditor ed. 1968); Br. Amicus Curiae 11-18. Even today, in many states, women do not share with men full rights and responsibilities with respect to jury service. *See* Br. Amicus Curiae 41-42. In educational institutions, on the job market and, most conspicuously, in the political arena, women continue to occupy second-place status.[6] Suggestive of the value that

---

[5] *Cf. Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954) (rejecting a "two-class" theory of equal protection); *Faruki* v. *Rogers*, 349 F. Supp. 723 (D.D.C. 1972).

[6] *See generally* K. Amundsen, The Silenced Majority: Women and American Democracy (1971); H. Hacker, Women as a Minority Group, Social Forces, no. 3 (1951); A. S. Rossi, Inequality Between the Sexes, in R. J. Lifton ed., The Women in America 106 (1964).

Sex discrimination charges represent the second largest category of complaints filed with the Equal Employment Opportunity Commission; in local EEOC offices, sex discrimination charges have run as high as 60 percent of total complaints. Pressman, Federal Remedial Sanctions: Focus on Title VII, 5 Valp. L. Rev. 374, 379 nn. 31-33 (1971). Despite legislation promising equal opportunity and equal pay, the earnings gap between men and women has been widening. *See* U.S. Women's Bureau, Dept. of Labor, Fact Sheet on the Earnings Gap (rev. ed. Dec. 1971). So has the gap in upward mobility. *See, e.g.*, Hoyle, Who Shall Be Principal, A Man or a Woman?, The National Elementary School Principal 23-25 (January 1969) (in 1928, 55 percent of elementary school principals

should be assigned to appellees' head count, former Secretary of Labor Hodgson observed in 1970 that discrimination against women in the labor market is "more subtle and more pervasive than against any other minority group."[7]

Women's "political influence" could be characterized as "substantial" (Br. Appellees 16) only by substituting fancy for fact. Not a single woman sits in the United States Senate; only 14 women hold seats in the House of Representatives. Over the past twenty years only one woman has chaired a House committee;[8] no woman has ever chaired a Senate committee. Less than 3 percent of positions in the federal government at and above GS-16 rank are held by women.[9] As of October 31, 1972 women comprised almost one-quarter of the foreign service, but less than 3 percent of the chiefs of missions.[10] At the state level, no woman serves as governor, and less than 6 percent of state legislators are women.[11]

---

were women; in 1968 only 12 percent of elementary school teachers, but 78 percent of elementary school principals were men); Schiller, The Widening Sex Gap, Library Journal 1097-1101 (March 15, 1969) (in 1930, women were chief librarians in 19 of 74 large colleges and universities; in 1968, only 4 of these posts were occupied by women).

[7] Quoted in the San Francisco Chronicle, July 26, 1970, Magazine section, p. 7.

[8] Congresswoman Lenore Sullivan chairs the House Merchant Marine and Fishery Committee.

[9] Interview with Helen Markoss, Director, Federal Women's Program, Dept. of H.E.W., in Washington, D.C., Jan. 8, 1973.

[10] Interview with Gladys P. Rogers, Special Assistant to Deputy Under Secretary for Management for Women's Affairs, Dept. of State, in Washington, D.C., Jan. 8, 1973.

[11] State legislators number over 7700; women hold only 424 of these offices. Interview with Ruth Mandel, Eagleton Center for the

4. Closely related to appellees' head count argument, and as their final reason for denying that the sex criterion is suspect, appellees assert that sex distinctions "do not express an implied legislative judgment of female inferiority." (Br. Appellees 17-19.) No such judgment, according to appellees, is embodied in a statute declaring women unfit for bartending (*Goesaert* v. *Cleary*, 335 U.S. 464 (1948)); a statute establishing a women's college to equip females to serve as secretaries and homemakers and in other occupations "suitable to their sex" (the state's men's college, by contrast, was established as a military school offering a full range of liberal arts and engineering degrees) (*Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971)); a statute presuming that women are preoccupied with home and children and therefore should be spared the bother of serving on juries (*Hoyt* v. *Florida*, 368 U.S. 57 (1961)); and a statute that has become a major roadblock to women seeking equal opportunities for remuneration and promotions in blue-collar employment (*Muller* v. *Oregon*, 208 U.S. 412 (1908)).[13]

Legal scholars who have assessed these legislative judgments less perfunctorily than appellees view the matter differently. Each judgment supposed by appellees to imply no "stigma of inferiority" has been exposed as resting upon

---

American Woman & Politics, Rutgers University, in Newark, NJ., Jan. 8, 1973.

While a person need not be a member of a group by birth, religion or class affiliation to represent that group fairly and in a manner rseponsive to its interests, the chances of effective representation are unquestionably enhanced when group members occupy decision-making posts.

[13] With the evidence of women's weakness offered at the turn of the century in *Muller, compare* A. Montagu, The Natural Superiority of Women (rev. ed. 1968).

unjustified (or at least unsupported) assumptions about individual capacities, interests, goals and social roles solely on the basis of sex." Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. Rev. 675, 676, 682-92 (bartending), 697-702 ("protective" labor legislation), 708-21 (jury service), 721-26 (public education) (1971). *See* Br. Amicus Curiae 34-44.

Legislative judgments "protecting" women from full participation in economic, political and social life have been labelled "benign" by persons who regard them as marking off for women a "separate but equal" role. Most men and women claim they value qualities traditionally associated with the mother-wife, *e.g.*, selflessness, sensitivity, passivity, and assertiveness. But investigations of social scientists leave no doubt that traits associated with the male breadwinner, *e.g.*, assertiveness, aggressiveness, independence, are valued more. Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal,* 28 J. Social Issues 59 (1972). *See also* Dinitz, Dynes & Clarke, *Preference for Male or Female Children: Traditional or Affectional,* 16 Marriage & Family Living 128 (1954); Fernberger, *Persistence of Stereotypes Concerning Sex Differences,* 43 J. Abnormal & Social Psychology 97 (1948); Kitay, *A Comparison of the Sexes in Their Attitudes and Beliefs on Women,* 34 Sociometry 399 (1940); Lynn, *A Note on Sex Differences in the Development of Masculine and Feminine Identification,* 66 Psychological Rev. 126 (1959); McKee & Sherriffs, *The Differential Evaluation of Males and Females,* 25 J. Personality 356 (1957); McKee & Sherriffs, *Men's and Women's Beliefs, Ideals, and Self-Concepts,* 64 Am. J. Sociology 356 (1959); Rosenkrantz, Vogel, Bee, Broverman & Broverman, *Sex-Role Stereotypes and Self-Concepts in College Students,* 32

J. Consulting & Clinical Psychology 287 (1968); Sherriffs & Jarrett, *Sex Difference in Attitudes About Sex Differences,* 35 J. Psychology 161 (1953); Sherriffs & McKee, *Qualitative Aspects of Beliefs About Men and Women,* 25 J. Personality 451 (1957); Smith, *Age and Sex Differences in Children's Opinions Concerning Sex Differences,* 54 J. Genetic Psychology 17 (1939); L. White, Jr., *Educating Our Daughters* (1950).

Evidence abounds that the "submissive majority" perceives the real judgment underlying "benign" classifications and the "separate but equal" euphemism. Growing up in a society in which virtually all positions of influence and power are held by men, women believe that they belong to the inferior sex. Women's lack of self-esteem and their own belief, shared by men, that it is better to be male than female is reflected, for example, in the fact that male babies are preferred over female babies by both parents.[13] As Matina Horner observed, "It has taken . . . a long time to become aware of the extent to which [the stereotypical] image of woman has actually been internalized, thus acquiring the capacity to exert psychological pressures on [women's] behavior of which [women themselves] are frequently unaware .... [S]ocial and, even more importantly, internal psychological barriers rooted in this image really limit the opportunities to men." Horner, *Toward an Understanding of Achievement-Related Conflicts in Women,* 28 J. Social Issues 157, 158 (1972).[14]

---

[13] *See* K. Amundsen, *supra* at 122.

[14] *See also* Horner, Why Women Fail, Psychology Today, November 1969. Even women lawyers, a more self-assured group than most, exhibit anxiety about success lest it brand them "unfeminine." *See* Glancy, Women in Law: The Dependable Ones, 21 Harv. Law School Bulletin 22, 30-31 (June 1970).

The originator of the suspect classification doctrine might recognize today the extent of the prejudice, often unconscious but none-

Women who seek to break out of the traditional pattern face all of the prejudice and hostility encountered by members of a minority group. Worse than being "discrete and insular," [15] which for other minority groups at least has the advantage of fostering political organizing, women are separated from each other and therefore remain far distant from the political potential appellees ascribe to them. For women who want to exercise options that do not fit within stereotypical notions of what is proper for a female, women who do not want to be "protected" but do want to develop their individual potential without artificial constraints, classifications reinforcing traditional male-female roles are hardly "benign." Where, as in the instant case, a wife and husband deviate from the norm—the wife is the family breadwinner, the husband "dependent" in the sense that the wife supplies more than half the support for

---

devastating, encountered by women who want more than a place in a man's world. *See* C. F. Epstein, Women and Professional Careers: The Case of the Woman Lawyer 140 (1968) (thesis on file at the Faculty of Political Science, Columbia University):

> [A] 1922 Barnard graduate recalled:
>
> At the time I was ready to enter law school, women were looked upon as people who should not be in law schools. . . . I wanted very much to go to Columbia, but I couldn't get in. I went over to see Harlan Stone, Dean Stone, who was later Chief Justice, and asked him to open the law school [to women] and he said no. . . . I asked why . . . and he said "We don't because we don't." That was final.
>
> (From tape of author's conversation with Frances Marlatt, Attorney, Mount Vernon, New York.)

[15] As appellees acknowledge, women in the armed forces constitute a very small minority; living apart from men and working at jobs that are normally sex-segregated, they are a more "discrete and insular" group than non-white men who live and work alongside white men in the uniformed services. *See* Phillips, On Location with the WACS, Ms. Mag. 53 (Nov. 1972).

the marital unit[16]—"benign" legislative judgments serve as constant reminders that, in the view of predominantly or all-male decision-making bodies, life should not be arranged this way.

CONCLUSION

In sum, appellants submit that designation of the sex criterion as suspect is overdue, provides the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
MARC FEIGEN FASTEAU
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Attorneys for Amicus Curiae

JOSEPH J. LEVIN, JR.
MORRIS S. DEES, JR.
Southern Poverty Law Center
125 Washington Avenue
Montgomery, Alabama
Attorneys for Appellants

---

[16] Appellees incorrectly characterize appellants' "concession." (Br. Appellees 3.) It is conceded that the benefit statutes challenged here exclude Joseph Frontiero as a dependent. However, Sharron Frontiero, the family's sole breadwinner, supplied over one-third of her husband's support and all of her own.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FRONTIERO ET VIR *v.* RICHARDSON, SECRETARY OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 71-1694. Argued January 17, 1973—Decided May 14, 1973

A married woman Air Force officer (hereafter appellant) sought increased benefits for her husband as a "dependent" under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076. Those statutes provide, solely for administrative convenience, that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support. When her application was denied for failure to satisfy the statutory dependency standard, appellant and her husband brought this suit in District Court, contending that the statutes deprived servicewomen of due process. From that Court's adverse ruling, they took a direct appeal. *Held:* The judgment is reversed. Pp. 5-14; 14; ———.

341 F. Supp. 201, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, concluded that 37 U. S. C. §§ 401, 403 and 10 U. S. C. §§ 1072, 1076, as inherently suspect statutory classifications based on sex, are so unjustifiably discriminatory as to violate the Due Process Clause of the Fifth Amendment. Pp. 5-14.

MR. JUSTICE STEWART concluded that the challenged statutes work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71. P. 14.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, while agreeing that the statutes deprive servicewomen of due process, concluded that in the light of *Reed* v. *Reed*, 404 U. S. 71, and the fact that the Equal Rights Amend-

ment has been submitted to the States for ratification, it is inappropriate to decide at this time whether sex is a suspect classification. Pp. ———.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a statement concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined. REHNQUIST, J., filed a dissenting statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, v. Elliot L. Richardson, Secretary of Defense, et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[May 14, 1973]

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join.

The question before us concerns the right of a female member of the uniformed services[1] to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 1072, 1076, on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. 37 U. S. C. § 401 (1); 10 U. S. C. § 1072 (A). A servicewoman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his sup-

[1] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U. S. C. § 101 (3); 10 U. S. C. § 1072 (1).

port. 37 U. S. C. § 401; 10 U. S. C. § 1072 (2)(C).[1] Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment. A three-judge District Court for the Middle District of Alabama, one judge dissenting, rejected this contention and sustained the constitutionality of the provisions of the statutes making this distinction. 341 F. Supp. 201 (1972). We noted probable jurisdiction. 409 U. S. — (1972). We reverse.

I

In an effort to attract career personnel through reenlistment, Congress established, in 37 U. S. C. § 401 *et seq.*, and 10 U. S. C. § 1071 *et seq.*, a scheme for the provision of fringe benefits to members of the uniformed services on a competitive basis with business and industry.[2] Thus, under 37 U. S. C. § 403, a member of the uniformed services with dependents is entitled to an

---

[1] 37 U. S. C. § 401 provides in pertinent part:

"In this chapter, 'dependent,' with respect to a member of a uniformed service, means—

"(1) his spouse;

. . . . . .

"However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. . . ." 10 U. S. C. § 1072 (2) provides in pertinent part:

"'Dependent,' with respect to a member . . . of a uniformed service, means—

"(A) the wife;

. . . . . .

"(C) the husband, if he is in fact dependent on the member . . . for over one-half of his support. . . ."

[2] See 102 Cong. Rec., 84th Cong., 2d Sess., 3849–3850 (Cong. Kilday), 8043 (Sen. Saltonstall); 95 Cong. Rec., 81st Cong., 1st Sess., 7662 (Cong. Kilday), 7664 (Cong. Short), 7666 (Cong. Havenner), 7667 (Cong. Bates), 7671 (Cong. Price). See also 10 U. S. C. § 1071.

increased "basic allowance for quarters" and, under 10 U. S. C. § 1076, a member's dependents are provided comprehensive medical and dental care.

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought increased quarters allowances, and housing and medical benefits for her husband, appellant Joseph Frontiero, on the ground that he was her "dependent." Although such benefits would automatically have been granted with respect to the wife of a male member of the uniformed services, appellant's application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.[4] Appellants then commenced this suit, contending that, by making this distinction, the statutes unreasonably discriminate on the basis of sex in violation of the Due Process Clause of the Fifth Amendment.[5] In essence, appellants asserted that the discriminatory impact of the statutes is two-fold: first, as a procedural matter, a female member is required to demonstrate her spouse's dependency, while no such burden is imposed upon male members; and second, as a substantive matter, a male member who does not provide more than one-half of his wife's support receives benefits, while a similarly situated female member is denied such benefits. Appellants therefore sought a permanent in-

[4] Appellant Joseph Frontiero is a full-time student at Huntingdon College in Montgomery, Alabama. According to the agreed stipulation of facts, his living expenses, including his share of the household expenses, total approximately $354 per month. Since he receives $205 per month in veterans' benefits, it is clear that he is not dependent upon appellant Sharron Frontiero for more than one-half of his support.

[5] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see *Shapiro* v. *Thompson*, 394 U. S. 618, 641–642 (1969); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

junction against the continued enforcement of these statutes and an order directing the appellees to provide Lieutenant Frontiero with the same housing and medical benefits that a similarly situated male member would receive.

Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members,[4] a majority of the three-judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family—and the wife typically the "dependent" partner—"it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members." 341 F. Supp., at 207. Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District

[4] The housing provisions, set set forth in 37 U. S. C. § 701 *et seq.*, were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H. R. Rep. No. 779, 81st Cong., 1st Sess.; S. Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in substance the dependency definitions of § 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by § 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S. Rep. No. 917, 78th Cong., 2d Sess., 4.

The medical benefits legislation, 47 U. S. C. § 401 *et seq.*, was enacted as the Dependents' Medical Care Act of 1956. As such, it was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H. R. Rep. No. 1806, 84th Cong., 2d Sess.; S. Rep. No. 1878, 84th Cong., 2d Sess.

Court speculated that such differential treatment might conceivably lead to a "considerable saving of administrative expense and manpower." *Ibid.*

II

At the outset, appellants contend that classifications based upon sex, like classifications based upon race,[7] alienage,[8] and national origin,[9] are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed* v. *Reed*, 404 U. S. 71 (1971).

In *Reed*, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Appellant, the mother of the deceased, and appellee, the father, filed competing petitions for appointment as administrator of their son's estate. Since the parties, as parents of the deceased, were members of the same entitlement class, the statutory preference was invoked and the father's petition was therefore granted. Appellant claimed that this statute, by giving a mandatory preference to males over females without regard to their individual qualifications, violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that the Idaho statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification sub-

[7] See *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

[8] See *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971).

[9] See *Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

ject to scrutiny under the Equal Protection Clause." 404 U. S., at 75. Under "traditional" equal protection analysis, a legislative classification must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971); *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

In an effort to meet this standard, appellee contended that the statutory scheme was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests. Moreover, appellee argued that the mandatory preference for male applicants was in itself reasonable since "men [are] as a rule more conversant with business affairs than . . . women." [10] Indeed, appellee maintained that "it is a matter of common knowledge, that women still are not engaged in politics, the professions, business or industry to the extent that men are." [11] And the Idaho Supreme Court, in upholding the constitutionality of this statute, suggested that the Idaho Legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women." [12]

Despite these contentions, however, the Court held the statutory preference for male applicants unconstitutional. In reaching this result, the Court implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed*,

[10] Brief of Appellee, at 12, *Reed* v. *Reed*, 404 U. S. 71 (1971).
[11] *Id.*, at 12–13.
[12] *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P. 2d 635, 638 (1970).

supra, at 77. The Court therefore held that, even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Id.*, at 76. This departure from "traditional" rational basis analysis with respect to sex-based classifications is clearly justified.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.[13] Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim:

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the ideas of a woman adopting a distinct and

[13] Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils. See M. Gruberg, Women in American Politics 4 (1968). See also A. de Tocqueville, Democracy in America, pt. 2 (Reeves tr. 1840), in World's Classic Series 400 (Galaxy ed. 1947).

independent career from that of her husband. . . .

". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell* v. *Illinois*, 83 U. S. [16 Wall.] 130, 141 (1873) (Bradley, J., concurring).

As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally, L. Kantowitz, Women and the Law: The Unfinished Revolution 5–6 (1969); G. Mydral, An American Dilemna 1073 (2d ed. 1962). And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights" [14]—until adoption on the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades.[15]

---

[14] *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); see *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621, 626 (1969); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

[15] See generally, The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kantowitz, Women and the Law: The Unfinished Revolution (1969); A. Montague, Man's Most Dangerous Myth (4th ed. 1964); The President's Commission on the Status of Women, American Women (1963).

Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic,[16] women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.[17] See generally, K. Amundsen, The Silenced Majority: Women and American Democracy (1971); The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970).

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.[18] As a result, statutory distinc-

[16] See, *e. g.*, Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507 (1971).

[17] It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single women presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. See Joint Reply Brief of Appellants and American Civil Liberties Union (*Amicus Curiae*) 9.

[18] See, *e. g.*, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1173–1174 (1969).

tions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilties of its individual members.

We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin."[20] Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex."[21] And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[22] Thus, Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal

---

[20] 47 U. S. C. §§ 2000e-2 (a), (b), (c). (Emphasis added.) See generally, Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824 (1972); Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971).

[21] 29 U. S. C. ¶ 206 (d). (Emphasis added). See generally, Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970, 39 U. Cin. L. Rev. 615 (1970).

[22] H. J. Res. No. 208, 92d Cong., 2d Sess. (1972). In conformity with these principles, Congress in recent years has amended various statutory schemes similar to those presently under consideration so as to eliminate the differential treatment of men and women. See 5 U. S. C. § 2108, as amended, 85 Stat. 644; 5 U. S. C. § 7152, as amended, 85 Stat. 644; 5 U. S. C. § 8341, as amended, 84 Stat. 1961; 38 U. S. C. § 102 (b), as amended, 86 Stat. 1074.

branch of Government is not without significance to the question presently under consideration. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 240, 248–249 (1970); *Katzenbach* v. *Morgan*, 384 U. S. 641, 648–649 (1966).

With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.

III

The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U. S. C. §§ 401, 403, and 10 U. S. C. §§ 2072, 2076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated." *Reed* v. *Reed*, *supra*, at 77.

Moreover, the Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while hus-

bands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.[22]

The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[23] And in light of the fact that the

[22] It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. See *Gruenwald* v. *Gardner*, 390 F. 2d 591 (CA2 1968), cert. denied, 393 U. S. 982 (1968); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. Cf. *United States* v. *Gaston County*, 395 U. S. 285, 296–297 (1969).

[23] In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full-time 12 months per year. See U. S. Women's Bureau, Dept. of Labor, Highlights of Women's Employment & Education 1 (W. B. Pub. No. 71-191, March 1972). Moreover, 41.5% of all married women are employed. See U. S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971 4 (Summary Special Labor Force Report, August 1972). It is also noteworthy that, while the median income of a

dependency determination with respect to the husbands of female members is presently made solely on the basis of affidavits, rather than through the more costly hearing process,[24] the Government's explanation of the statutory scheme is, to say the least, questionnable.

In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution]. . . ." *Reed* v. *Reed*, *supra*, at 77, 76. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience,

---

male member of the armed forces is approximately $3,686, see The Report of the President's Commission on an All Volunteer Armed Force 51, 181 (1970), the median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States Table No. 535 (1972). Applying the statutory definition of "dependency" to these statistics, it appears that, in the "median" family, the wife of a male member must have personal expenses of approximately $4,474, or about 75% of the total family income, in order to qualify as a "dependent."

[24] Tr. of Oral Arg. 27–28.

the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[25]

Reversed.

MR. JUSTICE STEWART concurs in the judgment, agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. *Reed* v. *Reed*, 404 U. S. 71.

MR. JUSTICE REHNQUIST dissents for the reasons stated by Judge Rives in his opinion for the District Court, *Frontiero* v. *Laird*, 341 F. Supp. 201 (1972).

---

[25] As noted earlier, the basic purpose of these statutes was to provide fringe benefits to members of the uniformed services in order to establish a compensation pattern which would attract career personnel through re-enlistment. See n. 3, *supra*, and accompanying text. Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Moritz* v. *Commissioner of Internal Revenue*, — F. 2d — (CA10 1972). See also 1 U. S. C. § 1.

SUPREME COURT OF THE UNITED STATES

No. 71-1694

Sharron A. Frontiero and Joseph Frontiero, Appellants, v. Elliot L. Richardson, Secretary of Defense, et al.

On Appeal from the United States District Court for the Middle District of Alabama.

[May 14, 1973]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of MR. JUSTICE BRENNAN, which would hold that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Supra*, at 5. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. *Reed* v. *Reed*, 404 U. S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve

the substance of this precise question, has been a
proved by the Congress and submitted for ratificati
by the States. If this Amendment is duly adopted,
will represent the will of the people accomplished in t
manner prescribed by the Constitution. By acting pr
maturely and unnecessarily, as I view it, the Court h
assumed a decisional responsibility at the very time wh
state legislatures, functioning within the traditional de
ocratic process, are debating the proposed Amendmen
It seems to me that this reaching out to pre-empt b
judicial action a major political decision which is cur
rently in process of resolution does not reflect appropria
respect for duly prescribed legislative processes.

There are times when this Court, under our system,
cannot avoid a constitutional decision on issues which
normally should be resolved by the elected representa
tives of the people. But democratic institutions are
weakened, and confidence in the restraint of the Court
is impaired, when we appear unnecessarily to decide sensi
tive issues of broad social and political importance at the
very time they are under consideration within the pre
scribed constitutional processes.